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Race Relations Law Reporter

A Complete, Impartial Presentation of Basic Materials, Including:

- ★ *Court Cases*
- ★ *Legislation*
- ★ *Orders*
- ★ *Regulations*

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Summary of Developments . . .

Education

PUBLIC SCHOOLS: An observable shift of emphasis in court decisions, relating to alleged racial discrimination in admission to public schools, occurs in certain of the cases reported in this issue of RACE RELATIONS LAW REPORTER. Increased importance is attached to the consideration of school board functioning, particularly in connection with administrative plans for compliance with the principle of the *School Segregation Cases* and the measurement of such plans against the standard of "all deliberate speed." In *Arkansas* a federal district court, in refusing an injunction, approved a plan submitted by officials of the Little Rock schools, providing for gradual integration over a period of approximately six years, beginning in 1957, as being a "prompt and reasonable start," (p. 851). Also in *Arkansas,* the Van Buren School Board, in accordance with the federal court's directive, submitted a "Progress Report and Plan of Integration" for approval (p. 860). The existence of an administrative plan providing for a degree of integration in 1957 was also involved in a case arising in *Maryland* (p. 862). There the federal district court refused the request for an injunction against the defendant school board and required the plaintiffs to exhaust available administrative remedies within the state before seeking federal court action.

An injunction against refusing to admit Negro plaintiffs to Mansfield High School was issued in *Texas,* (p. 884). The prior dismissal by the federal district court in this instance to allow the school board more time for the development of an administrative plan had been reversed by the United States Court of Appeals. In *Virginia,* school boards in Arlington (p. 890) and Charlottesville (p. 886) were directed by court order to admit pupils without regard to race or color. In the Arlington case the court recognized the possible modifying effect of administrative assignment procedures and remedies. The Charlottesville opinion notes the absence of any plan for compliance as one reason for issuing the injunction. The Attorney General of *Kentucky* issued an opinion relative to the necessity for the adoption of administrative plans prior to integration of schools (p. 983). In *Ohio,* the Attorney General gave an opinion, occasioned by an instance of forbidden racial segregation in the schools, with reference to compliance with law as a prerequisite for obtaining state funds (p. 985). Also in *Kentucky* plans of two county school boards for integration were announced (p. 966).

Disturbances connected with the opening of schools under court orders to admit Negro students for the 1956 term in Clinton, *Tennessee* and Mansfield, *Texas* are reflected in contempt and injunction proceedings in the former state (pp. 872, 879) and in a statement by Governor Shivers in the latter (p. 885).

LEGISLATION: Programs of legislation designed to deal with problems of school segregation were enacted in *Florida* (pp. 924, 940, 954 and 955), and *North Carolina* (beginning at p. 928) substantially as recommended by committees appointed by the governors of the two states. The *North Carolina* program includes amendments to the "School Placement Law," a program of "education expense grants" for children who otherwise would be required to attend racially integrated schools, and a "local option law" for closing schools subject to integration. The *Florida* program includes a "Pupil Assignment Law." Suggested regulations for implementing the latter act have been drafted by *Florida* school authorities for adoption by local school boards (p. 961).

COLLEGES AND UNIVERSITIES: In *Georgia* additional requirements for admission to state institutions of higher learning were adopted, (p. 968), while in *Louisiana* rules were promulgated with regard to the facilities and functions available to Negro students admitted to Louisiana State University, (p. 970). Further court action was taken in *Alabama* in connection with the expulsion of a Negro from the state university (p. 894).

TEACHERS: The action of a school board in *Arizona* in failing to renew the contract of a Negro teacher was upheld as having been taken

on valid and non-reviewable grounds as against a claim by the teacher that the action was based on racial discrimination, (p. 895).

Recreation

In *California* a case alleging denial of admission to municipal recreational facilities on the basis of race or color was dismissed upon a finding that the plaintiff was barred as a non-resident of the municipality (p. 897). A Sarasota, *Florida,* ordinance provides for the "clearing" of public bathing beaches when members of two or more different races are present on the beach (p. 945). *Louisiana* legislation prohibits interracial participation in athletic events or social functions and requires separate seating for white and Negro spectators at such events (p. 953). In *Florida* additional emergency powers were conferred on the governor to quell disturbances at public recreational facilities (p. 954). *Michigan* has enacted a statute to prohibit discrimination on the basis of race or color at places of public accommodation (p. 946). The Attorney General of that state has issued an opinion denying the use of facilities of the state tourist council to a resort advertising discriminatory practices (p. 988).

Employment

A state court in *Wisconsin* declined to give judicial enforcement to a recommendation of the Industrial Commission of that state that a bricklayer's union admit to membership without regard to race (p. 909). The Cleveland, *Ohio,* Community Relations Board, after a hearing, ordered a labor union in that city to cease alleged racial discrimination in membership requirements (p. 979). *Louisiana* has enacted legislation to require the furnishing of separate sanitary facilities for white and Negro employees (p. 947). In *New York* a charge of alleged religious or racial discrimination in the employment of probation officers by the judge of a Domestic Relations Court was terminated without order on the basis of an agreement to discontinue any such practices (p. 971).

Other Developments

The legislature of *Florida* has enacted a resolution asserting and denouncing "usurpation of power" by the United States Supreme Court (p. 948). In *Alabama* a fine of $100,000 for failure to produce certain records was imposed upon the National Association for the Advancement of Colored People (p. 917); and in *Georgia* legislation has been proposed to regulate organizations which "seek to influence public opinion or encourage and promote litigation" (p. 956). An action against a labor union in *Alabama* alleging interference with a right to work was sent back for a new trial by the Supreme Court of that state on the ground that the plaintiff's counsel had improperly injected racial bias in his argument to the jury (p. 905).

Reference

The REFERENCE section of this issue contains a study of the use of, and limitations on, class actions in the federal courts, particularly in connection with litigation involving issues of racial discrimination (p. 991).

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COURTS

EDUCATION

Public Schools—Arkansas

John AARON et al. v. William G. COOPER et al.

United States District Court, Eastern District, Arkansas, August 27, 1956, Civ. No. 3113.

SUMMARY: Negro school children in Little Rock, Arkansas, brought a class action in federal district court against school officials of that city. The complaint sought a declaration of the rights of the plaintiffs to attend public schools without discrimination on the basis of race or color and an injunction preventing enforcement of Arkansas' constitutional and statutory provisions requiring segregation in public schools. The answer of the defendants conceded the invalidity of the Arkansas constitutional and statutory provisions. The defendants presented to the court a plan, which had been evolved in May, 1955, providing for gradual integration of the schools. That plan calls for integration of high schools, junior high schools and then grammar schools over a period of approximately six years, with the initial integration to begin in September, 1957. The court approved the plan as being a "prompt and reasonable start" toward full integration, denied the granting of an injunction, but retained jurisdiction of the case to supervise the implementation of the plan.

MILLER, District Judge.

OPINION

This cause was tried to the court on August 15, 1956.

At the conclusion of the evidence, the case was argued orally by the able counsel for the respective parties and was submitted to and taken under advisement by the court.

The pleadings and evidence, along with the arguments and contentions of the attorneys, have been fully considered, and the court now files this opinion in lieu of formal findings of fact and conclusions of law, and incorporates herein as a part hereof the findings of fact and conclusions of law as provided by Rule 52(a), F.R.C.P.

On February 8, 1956, the minor plaintiffs between the ages of 6 and 21 years, through their legal representatives, filed their complaint in this court against the President and Secretary of the Board of Directors of Little Rock School District; the Superintendent of Little Rock School District; and the Little Rock School District itself.

The complaint is prolix and contains many redundant allegations. In brief, the plaintiffs alleged that the defendants conspired and will continue to conspire to deprive the minor plaintiffs and members of the class of persons that they represent of their rights, privileges, and immunities as citizens of the United States and of the State of Arkansas by providing, affording, operating, and maintaining separate, segregated public free schools within the defendant District, for the minor plaintiffs and the members of the class of persons they represent because of their race and color contrary to and in violation of the Constitution and the laws of the United States; that the defendants are threatening to continue to so conspire and to deprive the minor plaintiffs and members of their class of their constitutional rights; that the minor plaintiffs, through their legal representatives, have petitioned the defendants to cease and desist from further unlawful discrimination against the minor plaintiffs.

The prayer of the complaint is that the court enter a decree declaring and defining the legal

rights and relations of the parties in the subject matter in controversy; that a permanent injunction be issued enjoining and restraining the individual defendants and their successors in office, and the defendant District, its agents, servants, employees, attorneys, and their successors in office, from executing or enforcing against the minor plaintiffs, or any member of the class of persons they represent, any constitutional provision, statute, or ordinance of the State of Arkansas, or any rule or regulation made or issued by any administrative agency, board, or commission of the State of Arkansas, that permit, require, or sanction the separation or segregation of minor plaintiffs or any member of the class of persons that they represent in the use and enjoyment of any public school building, land, facility, privilege, or opportunity within the State of Arkansas, and particularly within the defendant District, or any public free school that is under the supervision or control of the defendants or any of them on the basis or classification of race or color.

[*Defendants' Answer*]

On February 29, 1956, the defendants filed their answer to the complaint, and by their answer eliminated many of the allegations contained in the complaint. They alleged "that no State statute, no provision of the constitution of the State of Arkansas, and no rule or regulation promulgated by an administrative board of the State of Arkansas made pursuant to, or in purported reliance upon, a State statute or a State constitutional provision is involved herein • • • that they do not now rely, and have not since May 17, 1954, the date of the decision of the Supreme Court of the United States, in the case of Brown v. Board of Education, 347 U.S. 483, relied upon any State statute or State constitutional provision as authorizing segregation of the races in the public schools".

They denied that they have acted or purported to act since May 17, 1954, under any law of the State of Arkansas providing for schools on a separate and segregated basis because of race or color, or that they acted under the laws of the State of Arkansas in denying and refusing the minor plaintiffs, and the class they represent, the right and privilege of registration, enrolling, entering and attending classes and receiving instruction in the public schools operated by the defendant District.

Defendants alleged that since May 17, 1954, they have regarded as invalid the statutory provisions cited and set forth in the complaint of the plaintiffs, and that they do not rely upon said provisions in the plan they have adopted and propose for integration. The defendants also denied that they had conspired in any manner, or were then or now conspiring, to deprive the plaintiffs and the members of the class they represent of their rights and privileges and immunities as citizens of the United States and of the State of Arkansas, by providing and maintaining separate and segregated schools contrary to and in violation of the Constitution of the United States.

The defendants admitted that the adult plaintiffs "have met with defendants and have requested immediate integration, and that they have tendered their minor children to Central High School, Technical High School, Forest Heights Junior High School, and Forest Park Elementary School", all of which are within the defendant District, and that such schools are next most proximate to the residences of the adult plaintiffs.

[*Plan of Integration*]

Defendants further answering alleged that soon after the decision of the Supreme Court was handed down on May 17, 1954, they issued to the public press a statement setting forth their attitudes as to integration, and that later the defendants prepared a Plan of Integration. A copy of the public statement and a copy of the Plan of Integration are attached to the answer and made a part thereof.

> "The defendants are now in good faith endeavoring to integrate the schools of the Little Rock School District in accordance with the terms and conditions and the time schedule as set forth in said Plan. The said Plan and the reasons which make it appropriate, reasonable, and necessary in this particular locality have been explained to the adult plaintiffs and to all others who have sought information from defendants."

The defendants then alleged that the Plan is peculiarly fit and suitable for the defendant District, and will best serve the educational needs of both races, and the personal interest of the plaintiffs in being admitted to the public schools as soon as practicable on a nondiscriminatory

basis; that the plaintiffs unreasonably insist on a hasty integration which will be unwise, unworkable, and fraught with danger; that would prove detrimental to the personal interest of plaintiffs and the educational needs of both races, and would unnecessarily and inevitably hinder and retard the accomplishment of integration of the schools of the defendant District.

[*No Constitutional Question*]

Thus, under the pleadings in this case there is no constitutional question involved. The defendants freely recognize their obligation to provide as soon as reasonably practicable integration in the defendant District. The primary, if not the only, question before the court is, to use the words of the Supreme Court, "the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system".

[*Facts*]

There is no dispute between the parties as to the facts. They are as follows:

(1) The adult petitioners and minor plaintiffs are each citizens and residents of the City of Little Rock, Pulaski County, Arkansas, and are each members of the Negro race. The defendants are the Little Rock School District, its Board of Directors and its Superintendent. This is a class action by plaintiffs seeking integration of public schools in the Little Rock School District.

(2) The Little Rock School District contains 32.9 square miles. It was created in 1870 and since its inception the various schools in the District have been operated on a segregated basis.

On May 20, 1954 (three days after the Supreme Court rendered its decision in Brown v. Board of Education, 347 U.S. 483) the Little Rock School Board adopted a statement concerning "SUPREME COURT DECISION—SEGREGATION IN PUBLIC SCHOOLS." This statement was released for publication on May 23, 1954, and, inter alia, it provided:

> "• • • Until the Supreme Court of the United States makes its decision of May 17, 1954 more specific, Little Rock School District will continue with its present program.
>
> "It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed.
>
> "During this interim period we shall do the following:
>
> 1. Develop school attendance areas consistent with the location of white and colored pupils with respect to present and future physical facilities in Little Rock School District.
> 2. Make the necessary revisions in all types of pupil records in order that the transition to an integrated school system may serve the best interests of the entire school district.
> 3. Make research studies needed for the implementation of a sound school program on an integrated basis.
>
> • • • "

(3) The School Board instructed the Superintendent, the defendant, Virgil Blossom, to prepare a plan for the integration of the schools in the Little Rock School District. Such a plan was prepared and approved by the Board on May 24, 1955 (seven days prior to the supplemental opinion of the Supreme Court in Brown v. Board of Education, 349 U.S. 294). The plan is as follows:

"LITTLE ROCK BOARD OF EDUCATION
"PLAN OF SCHOOL INTEGRATION—
LITTLE ROCK SCHOOL DISTRICT

"The Supreme Court decision of May 17, 1954, which declared segregated schools unconstitutional has placed before us the most difficult educational problem of our time. A careful analysis of the following has been made.

1. Financial ability of Little Rock School District to integrate its schools.
2. Adequacy of present school facilities plus those to be added from $4,000,000.00 bond issue of March, 1953, plus the amount of money to be realized from the sale of the *'old Peabody School Site'* on West Capitol Ave.
3. Proper time and method for the integration of the schools of Little Rock School District *in a manner consistent with the law as finally in-*

terpreted by the Supreme Court and acceptable to both races.

"Our review of the three questions raised, reveal the following facts and opinions.

1. Integration of its schools by Little Rock School District will probably place *no serious additional* financial burden on the School District.
2. The facilities of Little Rock School District will be inadequate at the junior and senior high school levels until such time as the three senior high schools and six junior high schools are ready for occupancy.
3. It is our opinion that the proper time for, and method of integration is as follows:

A. *Time of Integration*

Integration of schools in Little Rock School District *cannot be accomplished until completion of the needed school facilities* (three senior high schools and six junior high schools) *and specific decrees have been formulated by the U.S. Supreme Court in the pending cases.*

B. *Method of Integration*

The method of changing from segregated to integrated schools should not be attempted simultaneously in grades one to twelve. Due to the complexity of this problem, an orderly systematically planned process should be followed. In Little Rock School District our research and study causes us to believe that the following plan charts the best course for all concerned.

1. In our opinion integration should begin at the senior high school level. (Grades 10-12) *(First phase of program)*

2. Following successful integration at the senior high school level, it should then be started in the junior high schools. (Grades 7-9) *(Second phase of program)*

3. After successful integration in junior and senior high schools it should be started in elementary schools. (Grades 1-6) *(Third phase of program)*
(Present indications are that the school year 1957-58 may be the first phase of this program.)

"The Board of Education's reasons for the adoption of this plan of integration are as follows:

1. Since our school system has been segregated from its beginning until the present time, the time required in the process as outlined should not be construed as unnecessary delay, but that which is justly needed with respect to the size and complexity of the job at hand.
2. It is ill advised to begin this process with inadequate facilities.
3. It is unwise to begin integration until the Supreme Court gives direction through its intepretation of the specific cases before it.
4. By starting integration at the senior high school level the process will begin where fewer teachers and students are involved.
5. In the adoption of a plan of integration((1) senior high school (2) junior high school (3) elementary schools) of sequential order, we provide the opportunity to benefit from our own experience as we move through each phase of this plan, thus avoiding as many mistakes as possible.
6. The establishment of attendance areas at the elementary level (Grades 1-6) is most difficult due to the large number of both students and buildings involved. Because of this fact it should be the last step in the process.

"We sincerely solicit your understanding and cooperation in the implementation of this plan, in order that the interests of all children may be better served.

LITTLE ROCK BOARD OF EDUCATION

William G. Cooper, Jr., President
Mrs. A. E. McLean, Vice President
Mrs. Edgar Dixon, Secretary

Dr. Edwin N. Barron
Foster A. Vineyard
R. A. Lile"

[*Problems Involved*]

(4) Since the adoption of the plan, Mr. Blossom has read and explained the plan to approximately 125 to 150 groups in an effort to obtain public acceptance of its provisions and the resulting orderly integration of the schools.

Foremost among the problems of the Little Rock School District are those of finances, structural organization, enrollment, and the selection and training of an adequate staff. These problems are not new, but they will be greatly accentuated by integration. By its plan the School Board is seeking to integrate its schools and at the same time maintain or improve the quality of education available at these schools. Some of its objectives are to provide the best possible education that is economically feasible, to consider each child in the light of his individual ability and achievement, to foster sound promotion policies, to provide necessary flexibility in the school curriculum from one attendance area to another, to select, procure, and train an adequate school staff, to provide necessary in-service training for the school staff, to provide a necessary educational program for deviates (mentally retarded, physically handicapped, speech correction, etc.), to provide the opportunity for children to attend school in the attendance area where they reside, to foster sound administrative practices, to maintain extra-curricular activities, to attempt to provide information necessary for public understanding, acceptance and support, and to provide a "teachable" group of children for each teacher. With regard to the latter objective, it is the policy of the Board to group children with enough homogeneity for efficient planning and classroom management.

[*School Population*]

(5) As of May, 1956, the number of Negro students in the Little Rock School District was as follows: Grades 1-6, 3,303; Grades 7-9, 1,252; Grades 10-12, 929; or a total of 5,484.

The number of white students on the same date was as follows: Grades 1-6, 9,285; Grades 7-9, 3,831; Grades 10-12, 3,126; or a total of 16,242.

The Negro students had 118 teachers for grades 1-6; 42 teachers for grades 7-9; and 25 teachers for grades 10-12.

The white students had 294 teachers for grades 1-6; 145 teachers for grades 7-9; and 108 teachers for grades 10-12.

The pupil-teacher ratio for all students was approximately 26-1 in senior high and junior high, and 30-1 in grade school.

At the present time there are three high schools in the District. Central High School was built in 1926, is presently an all-white school, and will accommodate 2,500 to 2,600 students. Technical High School was built in 1944, is now an all-white school, and will accommodate 225 to 250 students. Horace Mann High School was built in 1956, is now an all-Negro school, and will accommodate 925 students. Construction has begun on the West End High School, which will accommodate 925 students and which should be completed about July 15, 1957.

[*Start at High School Level*]

The School Board intends to start integration at the high school level (grades 10-12) in the fall of 1957. In accord with this plan the Board has completely reorganized its attendance areas. At present Central and Technical High Schools have a city-wide attendance area for white students, and Horace Mann High School has a city-wide attendance area for Negro students. Under the new plan Technical High School would remain a city-wide school for all students, but Central and Horace Mann High Schools, together with the new West End High School, would each have separate attendance areas. At this time there are no Negro students residing in the West End High School attendance area, but there are both Negro and white students residing in the Central and Horace Mann High School districts.

There are now six junior high schools in the District, and another one will be needed in the near future.

(6) In preparing for integration school authorities have taken a number of steps, including the establishment of attendance areas, study of aptitudes of the children, starting of the in-service program for staff members, new promotion policies, program of information to members of the community, harmonizing student records, continuation of building program, administrative studies, and work on the guidance program.

(7) As stated in the plan and established by the evidence, the Board intends to start integration in the fall of 1957 at the high school level. The reason for starting at the high school level is that fewer students, teachers, buildings, etc., will be involved. The school authorities hope to be able to learn by experience and to be better able to enter the next phase of the plan.

The second phase of the integration plan would start two or three years after the first phase, i.e., in 1959 or 1960, and would include grades 7-9 (junior high).

The final phase of the plan would start two or three years after the start of the second phase, and would include grades 1-6. In other words, complete integration would be effected not later than 1963.

(8) The Superintendent, Mr. Blossom, along with all the other defendants and the staff of the defendant district, has worked diligently in a good faith effort to prepare and to effectuate a plan of integration that will be to the best interest of all parties and to the public.

Mr. Blossom is a highly qualified and experienced school administrator and has given much thought and study to the myriad problems relating to integration. He has had the cooperation of the Little Rock School Board in his effort to achieve integration without lowering the quality of education offered to all the school children.

It may be supererogation for the court to here review the two decisions of the Supreme Court of the United States in which the rights of the plaintiffs are declared and the duties of the lower federal courts in a case such as the instant one are set forth, but, because of the intense public interest in the question now before the court, it seems advisable for the court to do so.

On December 9, 1952, four cases from the States of Kansas, South Carolina, Virginia, and Delaware were argued under the title of Brown et al v. Board of Education of Topeka et al. The cases were not immediately determined and were re-argued December 8, 1953, and were decided on May 17, 1954, one year, five months, and eight days after the first argument. Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483.

Following a factual outline of the cases, the Court at page 493 of 347 U.S. said:

> "We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does."

[*14th Amendment Validity*]

In the opinion the Court considered the validity of the adoption of the Fourteenth Amendment to the Constitution of the United States in 1868, and inferentially held that the Amendment was validly adopted. The Court also reviewed the six cases that had been before it involving the "separate but equal" doctrine in the field of public education, and at page 495 of 347 U.S. said:

> "We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plantiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

Because of the great variety of local conditions in the school districts involved in those cases, the Court recognized that the formulation of a decree presented problems of considerable complexity, and the Court restored the cases to the docket and requested further argument on the form of decrees to be entered in the cases then immediately under consideration.

The cases were re-argued on April 11-14, 1955, on the question of the form of relief to be granted, and on May 31, 1955, the second and implementing opinion was rendered. Brown et al. v. Board of Education of Topeka et al., 349 U.S. 294. In the latter opinion, speaking of the opinion handed down on May 17, 1954, the Court said:

> "The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle."

In the argument of April 11-14, 1955, the following questions, which the Court had pro-

pounded while it was considering its original opinion of May 17, 1954, were argued:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

The Court, in speaking of the arguments presented on the question of the type of relief, at pages 299 of 349 U.S. said:

"These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination."

The Court recognized that the school authorities would encounter many and varied problems which would have to be determined by them. In this connection the Court at page 299 of 349 U.S. said:

"Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts."

The Court held that in fashioning and effectuating the decrees, the trial courts should be guided by equitable principles; that equity has always been characterized by practical flexibility in shaping its remedies and by facility for adjusting and reconciling public and private needs.

At page 300 of 349 U.S. the Court said:

"At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

The Court held (349 U.S. 300) that the school authorities should make "a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner". It emphasized that the burden would rest upon the school authorities to establish that additional time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.

The Court then said that the trial "courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases."

[*South Carolina Case*]

In the case of Briggs et al. v. Elliott, one of the original cases before the Supreme Court, the three-judge court sitting in the Eastern District of South Carolina, upon a remand of the case, said: (132 F.Supp. 776)

> "It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools, or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution in other words does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.
>
> "The Supreme Court has pointed out that the solution of the problem in accord with its decision is a primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles.'"

Upon the request of the court, prior to the trial, the attorneys for the respective parties furnished the court citations of authorities upon which they were relying to support their respective contentions. The court has examined and read each of the authorities along with other decisions not cited by the attorneys. However, the decisions of the lower federal courts are of very little help, if any, in the solution of the question before the court. The primary responsibility for the implementation of the constitutional principles announced in the May 17, 1954, decision, Brown v. Board of Education et al., 347 U.S. 483, is upon the school authorities. It is the duty of the school authorities to solve the many and varied local problems. Because of the nature of the problems and the local conditions the school authorities often find that action taken by other school districts is inapplicable to the facts with which they are dealing. It is not the duty or function of the federal courts to regulate or take over and operate the public schools. That is still the duty of the duly state-created school authorities, but the free public schools must be maintained and operated as a racially nondiscriminatory system. During the period of transition from a segregated to a non-segregated system the school authorities must exercise good faith. They must consider the personal rights of all qualified persons to be admitted to the free public schools as soon as practicable on a nondiscriminatory basis. The public interest must be considered along with all the facts and conditions prevalent in the school district. Educational standards should not be lowered. If the school authorities have acted and are proceeding in good faith, their actions should not be set aside by a court so long as their action is consistent with the ultimate establishment of a nondiscriminatory school system at the earliest practicable date.

[*State Laws Invalid*]

The plaintiffs seek a decree declaring certain provisions of the Arkansas Constitution and statutes to be unconstitutional. These statutes

and the constitutional provisions of Arkansas have been declared unconstitutional by the Supreme Court of the United States. Defendants admit that the State laws requiring segregation are unconstitutional and void. Plaintiffs also ask in their complaint that the rights of the parties and others similarly situated be declared. Here there is no controversy between the litigants as to their respective rights. Plaintiffs claim the right to be admitted to schools without discrimination because of race or color. The defendants freely admit that right. The only point at issue relates to the adequacy of the plan of defendants for the transition from a segregated to a nonsegregated school system.

Plaintiffs also seek an injunction to compel the defendants to admit them to all free public schools without discrimination because of race or color. The defendants have declared their readiness to admit plaintiffs and others similiary situated to the schools under their control and supervision on a nonracial basis as soon as practicable. Here the rights claimed by the plaintiffs are admitted, and thus there is no threat on the part of defendants to deny plantiffs and others similarly situated any of their constitutional rights.

The history of equity jurisdiction is the history of regard for public consequences when a party seeks to employ the extraordinary remedy of injunction. Public interests have a high claim upon the discretion of a chancellor, and especially is this true under the facts in this case. Federal trial courts should exercise a sound discretion and use their authority only in exceptional cases, because of the scrupulous regard that the law has for the rightful independence of State authorities.

[*Harmonious Relationship Important*]

In cases where the Board of Directors is proceeding in good faith to establish a school system on a nonracial basis, the federal trial courts should maintain, if possible, a harmonious relation between state and federal authority where the state authority, in this instance the Board of Directors, is proceeding in good faith to discharge its duties, and thus to establish within a reasonable period of time a nonracial system of schools as required by the supreme law of the land.

As said by United States Circuit Judge, Ben F. Cameron, of the Fifth Circuit in his dissenting opinion in Brown et al. v. Rippy et al., 233 F.2d 796:

> "It is not reasonable that the Supreme Court would have placed primary responsibility in a group commissioned to act administratively with the expectation or requirement that the group would be hampered or vexed in accomplishing their task, severely difficult at the best, by contemporaneous litigation directed toward fashioning a club to be held over their heads. Such a judicial intervention would connote a distrust of the preliminary administrative process and would cast those conducting it under the handicap of suspicion so great as to thwart at the threshold the orderly carrying out of the procedures so plainly delineated by the Supreme Court."

[*Lack of 'Start' Alleged*]

Learned counsel for plaintiffs earnestly contended in their oral argument that the defendants had not made a prompt and reasonable start toward full compliance with the May 17, 1954, decision of the Supreme Court; that additional time should not be allowed the Board of Directors until and unless a reasonable start toward full compliance had been made, and that in this instance such a start had not been made by the defendants. Ordinarily, the word "start" means a beginning of a journey or a course of action. It is the first motion from a place or condition; the place of beginning or point of departure. When the word is considered in context, it must be construed to embrace any necessary action taken by a Board of Directors which will, if consistently followed in good faith, lead to the admission to public schools of the plaintiffs and others similarly situated as soon as practicable on a nondiscriminatory basis. The objective cannot be obtained in an orderly manner until a variety of obstacles have been removed. The defendants are making every effort to remove those obstacles in this case, and the court thinks they have made a prompt and reasonable start toward full compliance with the requirements of the law.

The testimony of the defendant Superintendent of Schools, Mr. Virgil Blossom, is convincing that not only he but the other defendants have acted in the utmost good faith. Their sole objective has been, and is now, to faithfully and

effectively inaugurate a school system in accordance with the law as declared by the Supreme Court. They are seeking and have been seeking ways and means of effectuating a transition from a segregated to a nondiscriminatory system without destroying the fundamental objectives of the system.

This court is of the opinion that it should not substitute its own judgment for that of the defendants. The plan which has been adopted after thorough and conscientious consideration of the many questions involved is a plan that will lead to an effective and gradual adjustment of the problem, and ultimately bring about a school system not based on color distinctions.

It would be an abuse of discretion for this court to fail to approve the plan or to interfere with its consummation so long as the defendants move in good faith, as they have done since immediately after the decision of May 17, 1954, to inaugurate and make effective a racially nondiscriminatory school system.

Therefore, an order should be entered approving the plan of the defendants as being adequate, and denying the prayer of the complaint of plaintiffs for a declaratory judgment and injunctive relief. The order should further provide that the court retain jurisdiction of this case for the entry of such other and further orders as may be necessary to obtain the effectuation of the plan as contemplated and set forth herein.[1]

1. The court is of the opinion that this order will be final and appealable, even though the court retains jurisdiction for the purpose of entering further orders. See, Pioche Consolidated, Inc., et al. v. Fidelity-Philadelphia Trust Co., et al., 9 Cir., 191 F.2d 399. 400; 13 Cyc. of Federal Procedure, Sec. 57.20, p. 126.

DECREE

On August 15, 1956, this cause came on for trial, the plaintiffs appearing by Messrs. Wiley A. Branton and U. Simpson Tate, their attorneys, and the defendants appearing by Messrs. A. F. House, Leon B. Catlett, Frank E. Chowning, Henry Spitzberg and R. C. Butler, Jr., their attorneys. Evidence in behalf of the respective parties was adduced and arguments of counsel were heard and, at the conclusion thereof, the case was submitted and taken under advisement.

Now, having considered the evidence adduced at the trial of this cause, the arguments of counsel, and the entire record of this case, the Court has prepared and filed here in its opinion relative thereto, and in accordance therewith.

IT IS ORDERED AND ADJUDGED that the plan of school integration of the Little Rock School District officially adopted by the Board of Directors on May 24, 1955, be and same hereby is in all things approved, and that the prayer of the complaint of the plaintiffs for a declaratory judgment and for injunctive relief be and is denied.

IT IS FURTHER ORDERED AND ADJUDGED that jurisdiction of this case be and is retained for the purpose of entering such other and further orders as may be necessary to obtain the effectuation of the plan as therein outlined and set forth.

This 28 day of August, 1956.

EDUCATION

Public Schools—Arkansas

Thomas Leroy BANKS et al. v. J. J. IZZARD, as President, etc., Van Buren Independent School District, et al.

United States District Court, Western District, Arkansas, Civ. No. 1236.

Negro school children in Van Buren, Arkansas, had brought suit in federal district court in that state seeking admission to public schools without regard to race. The defendants, officials of the Van Buren public schools, filed a motion for a continuance. The federal district court in which the suit was brought entered an interlocutory order requiring the school officials to make a "prompt and reasonable start" toward desegregation and to report the progress made to the court by August 15, 1956. 1 Race Rel. L. Rep. 299. The defendants, in August, 1956,

filed with the court a "Progress Report and Plan of Integration" in accordance with the order of the court. That report follows:

PROGRESS REPORT AND
PLAN OF INTEGRATION

Come the defendants herein, and pursuant to the order of this Court made and entered herein on January 18, 1956, report to the Court the progress that has been made by the Defendant District and the plans that have been formulated by the defendants to effectuate the transition from the present school system to a racially non-discriminatory school system, and for said report state:

I.

Prior to the filing of the complaint herein the Defendant District and the Defendant Directors made an approach to the problems raised in this case, and at that time and since the filing of this case have given earnest and careful consideration to the factors involved in the transition from the present school system to a racially non-discriminatory school system; that for the past six months the Defendant Directors have been employed in this consideration, and at a meeting of the Board of Directors of the Defendant School District held on August 7, 1956, the following was adopted as the plan of integration of the Van Buren School District:

"PLAN OF INTEGRATION

"1. The Directors of the Van Buren School District have the legal obligation of operating the schools of the District in conformity with the Constitution of the United States as interpreted by the United States Supreme Court, and the Directors believe that a great majority of the patrons of the Van Buren School District expect the Board to do so.

"2. In promulgating a plan of integration consideration has been given to several factors involved in such transition. These factors are:

"(a) The physical facilities of the Van Buren School District are presently inadequate. A building program which has been placed in effect will, when completed, relieve the present congestion, but this crowded condition will present a continuing problem because of an anticipated increasing school population.

"(b) Consideration must be given to the factor of the acceptability of a plan of integration and the developments that naturally follow the adoption of such plan, and the Board is of the opinion, after careful consideration, that undue haste in integrating prior to completion of the current building program will accentuate these developments. While the Directors realize that this plan and program for integration will not meet with the satisfaction of all of the patrons of the District, they believe that with the adoption of an orderly method of integration of the schools of the Defendant District, with proper timing and in a manner consistent with the announced constitutional principles, they will secure the cooperation of the patrons generally in the Van Buren School District, and thus with a minumum of confusion arrive at a solution acceptable to both races.

"3. After consideration of these factors, the Directors have concluded that a plan of integration should be commenced at the beginning of a school year after the completion of the new junior high school building. It is contemplated that the junior high school building, which was financed from millage voted in the March 16, 1956, school election, will be completed by the beginning of the 1957-1958 school year. Bonds of the School District in the principal amount of $210,000.00 have been sold and the proceeds are presently available for construction. A site for such building has been obtained, and leveling and excavation work is now in progress, with it being contemplated that bids will be let for the actual construction of the building within thirty days from this date. It is the plan and purpose of the Directors that this new junior high school building will be completed, furnished, and ready for occupancy by September, 1957. This will alleviate the present overcrowded condition of the combined junior-senior high school building, and it is the plan to commence integration at that time.

"4. Integration should be accomplished in a systematic manner with due account taken of the complexities attendant on this action. It is the opinion of the Directors, after study and research, that upon the completion of the new junior high school building and the separation of the junior-senior high schools, and the alleviation of the congested manner, integration can be accomplished in an orderly manner by enrol-

ling children in the ninth, tenth, eleventh, and twelfth grades (the four senior high school grades) for instruction without regard to race or color. Thus integration will be commenced at the senior high school level where fewer students and teachers are involved.

"5. Following integration in the senior high school and at the beginning of the next succeeding school year, integration should then be started in the junior high school comprising the seventh and eighth grades. It is the judgment of the Directors that integration in the junior high school should be accomplished in two steps, the first step being integrating the eighth grade and after completion of that integration and at the commencement of the next school year following, the integration of the seventh grade.

"6. Following successful integration at the junior high school level which, as indicated, should be accomplished within two years following the first step of the plan and at the beginning of the next succeeding school year, integration should be commenced in the elementary schools, comprising grades one to six inclusive. This third and final phase of integration should be accomplished by commencing at the sixth grade and annually thereafter integrating grades one to six in inverse order, thus accomplishing full integration within a period of nine years from the inception of the plar

"7. The Directors recognize that the Van Buren School System has been segregated from the beginning, and that it is their considered judgment that the effect and orderly integration with as few complexities as possible requires this minimum of time, and that this period of time in the judgment of the Directors is not an unnecessary delay of full integration. To commence integration with the present overcrowded and inadequate facilities and prior to the completion of the junior high school building is in the opinion of the Directors ill-advised. The adoption of this plan of integration will enable the Directors of the Van Buren School District and the school officials to more adequately cope with the problems attendant on integration. The integration of the junior high school and grade schools is more complex in that it will involve a greater number of students and a number of individual school facilities. To accomplish this integration in a systematic and orderly manner requires an analysis of attendance areas, bus routes, and other problems, and thus the Directors believe that this should be the final stage in the plan of Integration."

II.

These defendants state that they have given earnest and careful consideration to the above as the plan of integration of the Defendant District. They state that the above plan conforms with the rules of integration approved by the Supreme Court of the United States in its opinion in the case of Brown v. Board of Education, decided May 31, 1955 (349 U.S. 294). The Defendants are proceeding in good faith in the promotion of this plan, and they state that this plan, in their judgment, will best serve the educational needs of all of the patrons of the Van Buren District.

WHEREFORE, these Defendants pray that the plan of integration for the Defendant District as adopted by its Board of Directors and as presented herewith be approved, and that upon such approval the complaint herein be dismissed.

EDUCATION

Public Schools—Maryland

Rose Marie ROBINSON, by Fannie Robinson, her mother and next friend, et al. v. BOARD OF EDUCATION OF ST. MARY'S COUNTY et al.

United States District Court, District of Maryland, July 9, 1956, Civ. No. 8780.

SUMMARY: Negro school children in St. Mary's County, Maryland, brought a class action in federal district court under the Civil Rights Acts against school officials of that county seeking to require their admission to public schools without regard to race or color. The plaintiffs sought to require the school officials to make a "prompt and reasonable start" toward racial integration of the schools. County officials had previously announced a plan to begin integra-

tion in September, 1957. The court held that it had jurisdiction of the question but dismissed the complaint with leave to refile. The dismissal was stated to be for the purpose of allowing the plaintiffs to pursue their state administrative remedies, which the court held to be adequate and available.

THOMSEN, District Judge.

Defendants, the Board of Education of St. Mary's County, the individual members thereof, and the County Superintendent of Schools, have moved to dismiss the complaint filed against them by sixty-six Negro children through their parents and next friends, for a declaratory judgment and an injunction restraining defendants from "requiring these Plaintiffs and all other Negroes of public school age to attend or not to attend public schools in St. Mary's County because of race."

THE PLEADINGS

This is a class action brought under the Civil Rights Acts, Title 42 U.S.C.A. secs. 1981, et seq., to redress the alleged deprivation, under color of state statute, ordinance, regulation, custom or usage, of rights, privileges and immunities secured by the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Acts. Plaintiffs allege that solely because of their race and color they are forced to attend racially segregated schools; that some of them are forced to travel greater distances than the distances to the nearest schools for white students; and that two schools for Negroes, the Banneker and Jarboesville schools, are greatly inferior to the schools maintained in St. Mary's County for white students. At a pre-trial conference, counsel for plaintiffs stated that they are not claiming any rights based upon the alleged inequality of the schools or the distances traveled, but are contending that these alleged facts should be considered in deciding whether a prompt and reasonable start has been made to desegregate schools in St. Mary's County. This understanding was confirmed at the hearing on the motion to dismiss.

The complaint further alleges that on or about September 23, 1955, plaintiffs petitioned the County Board to abolish segregation in the schools of St. Mary's County, but that the Board refused to desegregate the schools within its jurisdiction at that time, and has not devised a plan for such desegregation; that by continuing racial segregation in said schools defendants are denying plaintiffs their right to enjoy non-segregated education "as soon as practicable"; that plaintiffs are threatened with irreparable injury; and that they have no plain, adequate or complete remedy to redress these wrongs other than this suit for injunction.

The motion to dismiss is based upon the contentions:

That this court lacks jurisdiction: (a) because it does not appear that plaintiffs have suffered or are threatened with irreparable injury, (b) because plaintiffs have a clear, adequate and complete remedy at law in the state courts by way of mandamus, and (c) because plaintiffs have a clear, adequate and complete administrative remedy by way of appeal to the State Board of Education;

That the complaint fails to state a claim against defendants upon which relief can be granted: (a) because it does not appear that defendants are acting in bad faith or are abusing their discretion in temporarily continuing the administration of the public schools of St. Mary's County on a segregated basis, (b) because this court should decline to take jurisdiction rather than interfere with state administrative agencies, and (c) because this suit is premature, in that it does not appear that desegregation of the public schools of St. Mary's County will not be accomplished within a reasonable time.

Defendants also seek dismissal of the action insofar as it requests the court to order defendants to present promptly to the court a plan of desegregation, because such a request is in essence a petition for a writ of mandamus, which this court is without power to grant in a case such as this.

THE STIPULATION

The parties have filed a stipulation of facts and have agreed that the stipulation and attached exhibits may be used in whole or in part by any of the parties at the hearing on the motion to dismiss, or in connection with any other preliminary motions which may be made by any party, or at the trial of this case on the merits. Both sides, however, have reserved the right to offer additional evidence at any future hearing.

The stipulation shows the following facts, among others:

On May 26, 1954, the State Board of Education issued a statement in reference to the first opinion of the Supreme Court in Brown v. Board of Education, 347 U.S. 483 (May 17, 1954), in which the Board stated:

> "* * * Until the conditions of the decision are made known finally, with the mandate and decree of the Supreme Court, any detailed plan of action for implementation would be premature. This statement does not imply, however, that the State Board of Education and the local school authorities, upon whom the major burden of solving the problem will fall, should delay in analyzing the situation and making plans for implementing the decision of the Court.
>
> * * *
>
> "The detailed problems in respect to implementing the decision of the Supreme Court will rest primarily upon the local boards of education. The problems involved in any program of integration will vary among the different school systems of the State, * * *.
>
> "The role of the State Board of Education is not to set the detailed pattern of operation but to take an official position that the decision will be implemented with fairness and justice to all, and with due regard for the professional aspects of the program. Further, its responsibility is to act in a general over-all supervisory nature to insure that standard, equitable practices are followed throughout the State."

Shortly after the second opinion in Brown v. Board of Education, 349 U.S. 294 (May 31, 1955), the Attorney General of Maryland delivered an opinion, addressed to the State Superintendent of Schools, advising him that all constitutional and legislative acts of Maryland requiring segregation in Maryland public schools are unconstitutional and must be treated as nullities. The Attorney General referred to "the legal compulsion presently existing on the appropriate school authorities of the State of Maryland to make '* * * a prompt and reasonable start' toward the ultimate elimination of racial discrimination in public education."

On June 22, 1955, the State Board of Education and the Board of Trustees of the State Teachers' Colleges of Maryland adopted a joint resolution.[1] After recognizing that the law of the land as announced by the Supreme Court automatically abolished all State laws "which raised any distinction according to race in the public school system of the State of Maryland and of its local subdivisions," the statement continued:

> "2. Segregation according to race is hereby abolished in all of the State Teachers Colleges of Maryland. * * *
>
> "3. The Supreme Court recognized, and the State Board of Education recognizes, that factual conditions vary in different localities throughout the State, * * *. Such conditions may include public school building facilities, locations of the same with respect to population density of residential areas, transportation problems, teaching staffs, and other local and geographic conditions if applicable and pertinent to the transition from segregation to integration.
>
> "4. The State Board * * * (on) May 26, 1954, recommended that the local public school officials evaluate their respective local conditions and problems in anticipation of the final decision of the Supreme Court. All of the County public school officials have made or are making such studies. Now that the Supreme Court has passed its mandate and has directed the compliance with its decree with deliberate speed and with due regard to local conditions and in conformity with equitable considerations, the State Board of Education calls upon the local public school officials to commence this transition at the earliest practicable date, with the view of implementing the law of the land. Voluntary compliance with deliberate speed, without the necessity of court compulsion, is advised on the part of all local public school officials throughout the State.
>
> "5. The Staff of the State Department of Education shall co-operate in all possible ways with local public school officials to give effect to the law of the land in the process of the transition from segregation to desegregation."

1. The members of the State Board of Education, together with the State Superintendent of Schools, comprise the Board of Trustees of the State Teachers' Colleges.

On June 20, 1955, the County Board of Education and the County Commissioners of St. Mary's County appointed a Citizens' Committee, composed of sixteen white members and five colored members, to study local school problems and cooperate with and advise the County Board of Education in the formulation of a plan to abolish racial discrimination in the public schools of St. Mary's County. The full Committee met twelve times between August 2, 1955, and June 11, 1956, and additional meetings were held by a subcommittee. The Committee rendered an interim report in March, 1956, and a final report on June 11, 1956. The final report recommends a plan for transition to a racially non-discriminatory system of public schools in St. Mary's County by permitting integration in the elementary public schools on a voluntary basis, with the approval of the County Superintendent of Schools, if facilities are available, beginning September, 1957. Integration in transportation is recommended only when the County Board feels that satisfactory integration has been accomplished in the classrooms. The report discusses at length the various problems involved. The Committee was unanimous in recommending that transfers should not be made prior to September, 1957, but divided nine to eight, with one abstaining and two absent members, on the question whether desegregation should begin in the elementary schools or in the high schools. The County Board of Education is studying the report but has not yet acted on it.

At the request of the St. Mary's County chapter of the NAACP, a special meeting of the County Board was held on September 27, 1955. Delegations from the chapter and from the PTA of the Jarboesville school called upon the County Board to take "prompt and reasonable action" with "deliberate speed" with reference to the problem of segregation, and to remedy certain congested conditions at the Jarboesville school. There was presented to the County Board a petition signed by ninety-one persons, including the parents of many of the infant plaintiffs in this case, calling upon the Board "to take immediate steps to reorganize the public schools under your jurisdiction on a non-discriminatory basis" so as not to deny admission to or require attendance of any child at any school solely because of race and color.

On October 6, 1955, the County Superintendent wrote the chairman of the Jarboesville PTA advising him of the means proposed to relieve congestion of the Jarboesville school and of the policy of the County Board concerning integration. This policy was reiterated on November 8, 1955, in identical language, as follows:

> "1. The Board of Education of St. Mary's County, Leonardtown, Maryland, accepts the Supreme Court's decision of May 31, 1955 that 'racial discrimination in public education is unconstitutional.'
>
> "2. The Board of Education will confer with the Citizens' Committee selected by the County Commissioners and the Board of Education on June 20, 1955, in studying ways in which we may best proceed towards ultimate integration of four schools.
>
> "3. For the year 1955-56, the public schools of St. Mary's County will remain on a segregated basis."

THE PUBLIC SCHOOL LAWS OF MARYLAND

The applicable Maryland statutes are contained in Article 77 of the Annotated Code of Maryland (1951). Sec. 1 Provides for "a general system of free public schools" throughout the State. Sec. 2 provides: "Educational matters affecting the State and the general care and supervision of public education shall be entrusted to a State Department of Education, at the head of which shall be a State Board of Education." Sec. 3 provides: "Educational matters affecting a County shall be under the control of a County Board of Education."

Sec. 16 provides: "The State Board of Education shall, to the best of their ability, cause the provisions of this Article to be carried into effect. They shall determine the educational policies of the State; they shall enact by-laws for the administration of the public school system, which when enacted and published shall have the force of law. For the purpose of enforcing the provisions of this Article, and the enacted and published by-laws of the Board, the State Board of Education shall, if necessary, institute legal proceedings. The State Board of Education shall explain the true intent and meaning of the law, and they shall decide, without expense to the parties concerned, all controversies and disputes that arise under it, and their decision shall be final; * * *."

Sec. 17 provides that the State Board "shall exercise, through the state superintendent of schools and his professional assistants, general control and supervision over the public schools and educational interest of the State; they shall consult with and advise, through their executive officer and his professional assistants, county boards of education, boards of district school trustees, county superintendents, supervisors, attendance officers, principals, teachers, and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education." Secs. 34 and 35 provide that State Superintendent shall enforce all the provisions of Article 77 and of the enacted and published by-laws of the State Board, and that he shall execute the educational policies of the State Board.

Sec. 48 requires the County Boards "to maintain a uniform and effective system of public schools throughout their respective counties." By Sec. 50 the County Superintendent is made the executive officer, secretary and treasurer of the County Board. Sec. 51 provides: "The county Board of education shall to the best of its ability cause the provisions of this Article, the by-laws, and the policies of the state board of education to be carried into effect. Subject to this Article, and to the by-laws, and the policies of the state board of education, the county board of education shall determine, with and on the advice of the county superintendent, the educational policies of the county and shall prescribe rules and regulations for the conduct and management of the schools." By Sec. 58 the County Board is required to "consolidate schools wherever in their judgment it is practicable, and * * * pay, when necessary, for the transportation of pupils to and from such consolidated schools."

Sec. 84 provides that elementary schools "shall be free to all white youths, between six and twenty years of age." Sec. 124 provides: "All white youths between the ages of six and twenty-one years shall be admitted into such public schools of the State, the studies of which they may be able to pursue; provided, that whenever there are grade schools, the principal and the county superintendent shall determine to which school pupils shall be admitted."

Sec. 143 provides: "The county superintendent of schools, as the executive officer of the county board of education, shall see that the laws relating to the schools, the enacted and published by-laws and the policies of the State Board of Education and the rules and regulations and the policies of the county board of education are carried into effect." Sec. 144 provides: "The County Superintendent of Schools shall explain the true intent and meaning of the school laws, and of the by-laws of the State Board of Education. He shall decide, without expense to the parties concerned, all controversies and disputes involving the rules and regulations of the county board of education and the proper administration of the public school system in the county, and his decision shall be final, except that an appeal may be had to the State Board of Education if taken in writing within thirty days. * * * "

Secs. 207 and 208 make it the duty of the County Board "to establish one or more public schools in each election district for all colored youths, between six and twenty years of age, to which admission shall be free * * *; provided, that the colored population of any such district shall, in the judgment of the county board of education, warrant the establishment of such a school or schools"; and that "schools for colored children shall be subject to all the provisions of this Article."

DISCUSSION

I. The first opinion in Brown v. Board of Education, 347 U.S. 483, makes it clear that the infant plaintiffs have suffered and are threatened with irreparable injury as a result of being required to attend segregated schools. But the second opinion, 349 U.S. 294, stated, at 299-300:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. * * *
>
> "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for ad-

justing and reconciling public and private needs. * * * At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them."

It should be noted that both the Maryland State Board and the St. Mary's County Board have accepted without question the constitutional principles announced by the Supreme Court.

The second opinion in Brown v. Board of Education continued:

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases." 394 U. S. at 300-301.

[*Jurisdiction of Federal Court*]

II. (a) The fact that plaintiffs might have sought a writ of mandamus in a state court, instead of filing this suit, does not deprive this court of jurisdiction. "Barring only exceptional circumstances, see e.g. Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159, or explicit statutory requirements, e.g. 48 Stat. 775; 50 Stat. 738; 28 U.S.C. § 41 (1), resort to a federal court may be had without first exhausting the judicial remedies of state courts. Bacon v. Rutland R. Co., 232 U.S. 134; Pacific Tel. & Tel. Co. v. Kuykendall, 265 U.S. 196." Lane v. Wilson, 307 U.S. 268, at 274, 275. No exceptional circumstances or statutory requirements prevent such resort to a federal court in this case. On the contrary, the Civil Rights Acts specifically grant such jurisdiction. 42 U.S.C.A. 1983, 1988. See also 28 U.S.C.A. 1331, 1343.

(b) It is true that this court has no jurisdiction to issue a writ of mandamus or other order requiring defendants to present a plan of desegregation. As I read the second opinion in Brown v. Board of Education, quoted above, any Negro child who claims that he is being denied his constitutional rights by being required to attend a particular school because of his race or color may file his complaint in the appropriate federal court. Then, subject to established equitable principles, such as the requirement that a plaintiff must exhaust his administrative remedies before he is entitled to an injunction, the court will consider the various elements referred to by the Supreme Court in the passage quoted above, including the adequacy of any plans which defendants may propose. It is for the school authorities to decide whether or not they will propose a plan. After considering all of the elements, the court will enter such orders or decree as may be appropriate.

[*Exhaustion of Administrative Remedies*]

III. In two recent cases involving segregation in public schools the Fourth Circuit has reiterated that "it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted." Carson v. Board of Education of McDowell County (N.C.), 227 F.2d 789; Hood v. Board of Trustees of Sumter County School District No. 2 (S.C.), 232 F.2d 626. In the former case, after citing many Supreme Court cases

supporting the rule, the Fourth Circuit continued:

> "This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have the power to do in the premises is to enjoin violation of constitutional rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary." 227 F.2d at 790.

[*Differences in Maryland Remedies*]

In the Carson and Hood cases the respective states, North Carolina and South Carolina, have established clear and adequate administrative remedies, by statutes enacted after the decision in Brown v. Board of Education. These remedies include the right of appeal from school personnel or district trustees to the appropriate county or city board of education, with the right of appeal from the county or city board to the Superior Court of the county in North Carolina, and to the Court of Common Pleas of the county in South Carolina. The usual right of appeal from judgments of the county courts is also recognized.

The Maryland law is not so clear. The relevant provisions of the Maryland Code have been set out above. The State Board has statutory jurisdiction over questions arising out of administrative problems in the county schools. Its decision over matters within its jurisdiction is "final." As stated in Wiley v. Board of School Commissioners of Alleghany County, 51 Md. 401, this is a visitatorial power "and wherever that power exists, * * * (it) is comprehensive enough to deal with the questions involved in an existing controversy * * * courts of equity decline all interference, and leave the parties to abide the summary decision of those clothed with the visitatorial authority." This principle has been stated in similar terms in Shober v. Cochrane, 53 Md. 544; Underwood v. Board of County School Commissioners, 103 Md. 181, Zantzinger v. Manning, 123 Md. 169; School Commissioners v. Morris, 123 Md. 398; School Commissioners of Caroline County v. Breeding, 126 Md. 83; and Coddington v. Helbig, 195 Md. 330. There is an exception where the exercise of discretion by the State Board is "fraudulent or corrupt or such abuse of discretion as to amount to a breach of trust." Coddington v. Helbig, 195 Md. 330, 337.

[*Legal Questions*]

On the other hand, the Court of Appeals of Maryland has made it equally clear that legal questions are not to be determined by the State Board of Education, but that a party aggrieved by the action of a County Board may go directly to a court without the necessity of an appeal to the State Board of Education. Duer v. Dashiell, 91 Md. 660; School Commissioners v. Henkel, 117 Md. 97; County Board of Education v. Cearfoss, 165 Md. 178; Hobbs v. Hodges, 176 Md. 457.

Viewed realistically, most of the cases cited involved both administrative problems and questions of law. The Court of Appeals seems to have treated them as purely administrative problems or purely legal problems contrary to their true hybrid nature. But the test to determine which element shall control is elusive.

[*Maryland Rule*]

Plaintiffs argue that the question whether desegregation is being effected in a constitutional manner is a legal question, which should be determined by a court, under the Maryland rule. They claim that they have the right to have a federal court pass on that question at this time, in view of the fact that the County Board on October 6, 1955, and again on November 8, 1955, refused to abolish segregation during the school year 1955-56, and has not yet adopted a plan for the future. Defendants argue that the decision involves many administrative problems, with which the State Board is more familiar than a court can be; that plaintiffs have an adequate administrative remedy by way of application to the principal or County Superintendent for admission to the school of their choice, and appeal to the State Board from any decision of the County Superintendent adverse to their application.

Sec. 124 of the Maryland statute provides that "whenever there are grade schools, the principal

and the county superintendent shall determine to which school pupils shall be admitted." This statute on its face applies "to all white youths between the ages of six and twenty-one years." A different provision exists for colored children. Secs. 207, 208. The effect of the decision in Brown v. Board of Education, however, was to strike the word "white" out of sec. 124, and to give the County Superintendent the right to determine to which school Negro children as well as white children shall be admitted.

[*Legal Advisor*]

The Attorney General of Maryland is the legal adviser to the State Board of Education. I requested him to appear as amicus curiae in this case, and to present his opinion on the following questions: (1) Is there a right of appeal to the State Board of Education from the refusal by a County Board of such a request as is alleged in paragraph 5 of the complaint?[2] (2) Assuming (a) that the St. Mary's County Board takes no further action before September, 1956, or (b) that it adopts the recommendation of the Citizens' Committee—if a Negro child applies for admission to a white school and is denied admission by the County Superintendent, does such child have a right of appeal (a) to the County Board, or (b) to the State Board, or (c) to neither, his remedy being in the courts?

Pursuant to my request the Deputy Attorney General appeared at the second hearing on this motion and presented the following opinion: (1) No appeal lies to the State Board from the action of a County Board; but an appeal does lie to the State Board from the action of a County Superintendent who has decided a controversy or dispute; and since the County Superintendent is the executive officer of the County Board, in practice it often amounts to the same thing. (2) A Negro child whose application to attend a particular school is denied by the County Superintendent would have a right of appeal to the State Board, but not to the County Board. He cited, in support of this opinion, secs. 16, 124, and 144 of the Public School Law.

2. I.e. the petition filed by the parents of some of the infant plaintiffs, together with others, requesting the County Board to take immediate steps to reorganize the county schools on a non-discriminatory basis, so as not to deny or require attendance at any school solely because of the race or color of the child.

Since May 31, 1955, a number of the counties in Maryland have adopted rules or regulations permitting any child regardless of race to make individual application to be admitted to any school, admissions to be granted in accordance with such rules or regulations as the County Board may adopt and with regard to the available facilities in such schools. On June 3, 1954, immediately after the first opinion in Brown v. Board of Education, a somewhat similar rule was adopted by the Board of School Commissioners of Baltimore City, which under the home rule provisions of the Maryland Constitution is not subject to the visitatorial authority of the State Board of Education. It may be that the Board of Education of St. Mary's County will adopt some such rule. But whether or not such a rule is adopted, I concur in the opinion of the Attorney General that individual Negro children now have the right to apply under sec. 124 for admission to a particular school, and that from the decision of the County Superintendent on such application an appeal lies to the State Board. Whether the refusal of such an application would also give an immediate right to file proceedings in a state court to determine any question of law involved, or to file proceedings in this court to review any alleged deprivation of constitutional rights, would depend upon the reason or reasons for such refusal. But I hold that the Maryland law does provide adequate administrative remedy for the protection of plaintiffs' constitutional rights.

[*Adequacy of Remedies*]

IV. Plaintiffs contend that they are entitled to a declaratory judgment or an injunction based upon the action of the County Board on the petition presented to it in September, 1955, by ninety-one persons, including many of the adult plaintiffs, parents of the infant plaintiffs in this case. The nature of that petition and of the action taken by the County Board has been set out above. It is true that no appeal lay to the State Board from the action of the County Board on that petition. But that does not mean that the plaintiffs did not have an adequate administrative remedy, by application for admission to the school of their choice and appeal an adverse decision of the County Superintendent thereon.

It is not necessary to decide in this case whether the plaintiffs had any remedy in the

state courts as a result of the action of the County Board on their petition. Nor is it necessary to decide at this time whether this court can ever grant relief in such a case before the plaintiffs have appealed to the State Board. I am satisfied that under all of the circumstances of this case the court should not issue an injunction against the County Board or the County Superintendent until the plaintiffs have exhausted their administrative remedy by appealing to the County Superintendent for admission to the school of their choice, and appealing to the State Board from an adverse decision. Brown v. Board of Education, supra; Carson v. Board of Education, supra; Hood v. Board of Trustees of Sumter County School District No. 2, supra, and cases cited therein.

[*Local Problems*]

St. Mary's County is the southernmost county in Southern Maryland, agricultural, slow to change. Its traditional pattern has been disturbed during the past fifteen years by the establishment of the Patuxent Naval Base. Serious problems exist with respect to school facilities and transportation. The appointment of the Citizens' Committee in the summer of 1955 and its conscientious study of the problems during the past school year constituted a prompt and reasonable start toward compliance with the Supreme Court's ruling.

That committee has now reported, and the County Board is studying its recommendations. No doubt the County Board will take some action, adopt some plan, during the summer. I intimate no opinion with respect to the sufficiency of the plan recommended by the committee. As the Supreme Court said: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles." 349 U.S. at 299. The County Superintendent, the County Board and the State Board, through their respective counsel, have stated that they will give prompt attention to any application, petition or appeal filed by or on behalf of Negro students. If the final decision of the school authorities is adverse to such applicants, or if it is unreasonably delayed, they may apply to this court or to the appropriate state court for any relief to which they may be legally entitled.

The motion to dismiss the complaint is hereby granted, with leave to the plaintiffs or any of them to file an amended complaint on or before November 15, 1956; provided, that if they or any of them shall have an application, petition or appeal pending before the County Superintendent, the County Board or the State Board on September 15, 1956, he or they may file such amended complaint at any time until sixty days after the State Board shall have ruled on the question presented by such application, petition or appeal.

EDUCATION

Public Schools—North Carolina

In re OPINION OF THE JUSTICES

Supreme Court of North Carolina, July 17, 1956, 93 S.E.2d 853.

SUMMARY: The Governor of North Carolina requested of the justices of the North Carolina Supreme Court an opinion whether certain proposed constitutional amendments relating to the operation of the public schools (see p. 928) might be submitted in an election held prior to

the general election. The court held that such a special election would be valid provided it was held in conformity with the general election laws.

His Excellency, Luther H. Hodges, Governor of the State of North Carolina, addressed to the Chief Justice and Associate Justices of the Supreme Court of North Carolina the following communication:

"June 28, 1956.

"Gentlemen:

"The Advisory Committee on Education, appointed pursuant to Resolution 29 of the 1955 Session of the General Assembly, filed its report on April 5, 1956.

"The Committee recommended the calling of a special session of the General Assembly to consider submitting to the people the question of changes in our Constitution so that the General Assembly might have power to enact legislation to give effect to the Committee recommendations.

"It is my opinion, concurred in, I think, by the vast majority of the citizens of our State, that how we should solve our educational problems should be free of partisan politics.

"For that reason, I did not seek the advice and consent of the Council of State to a special session of the General Assembly until after the Statewide Primary.

"A special session of the General Assembly has now been called to convene at noon on July 23. I propose to submit the report of the Advisory Committee on Education and to recommend that the Assembly submit a constitutional amendment to the people, and enact legislation to implement the amendment, if it should be approved at an election to be held for that purpose.

"Because of my feeling that the problem ought not in any manner to be involved in partisan politics, I desire to recommend to the General Assembly that such amendment, as it may propose, be submitted to the people of the State at a time other than the election of constitutional officers, and that the only questions to be submitted to the electorate at that time shall be amendments to the Constitution.

"The Constitution requires amendments to be submitted 'at the next general election.' The Constitution does not define 'general election.'

"The Attorney General has advised me that, in his opinion, an election to be held prior to November and in conformity with the general election laws and for the sole purpose of considering constitutional amendments would meet the requirements of Article XIII of our Constitution.

"The question is, however, of such great importance that I feel justified in seeking an opinion of the Supreme Court. Hence, I respectfully request, if in keeping with the proprieties and functions of the Court, an advisory opinion on the following question:

"May the General Assembly at its special session to be held in July, provide for the holding, prior to November, of a Statewide election, so as to meet the constitutional requirements of a general election, when the only questions which may be submitted to the electorate on the day designated for the election are the ratification or rejection of:

"(a) Constitutional amendments proposed by Chapters 1169, 1245, and 1253 of the 1955 Session of the General Assembly, and

"(b) Such constitutional amendment or amendments as may be duly proposed at the special session of the General Assembly.

"Your opinion on the question presented will be appreciated and will guide me in the recommendations which I shall make to the special session of the General Assembly as to appropriate means to be taken looking to the solution of our educational problem.

"Sincerely,
"Luther H. Hodges,
"Governor"

"16 July, 1956.
"Raleigh, North Carolina

"To His Excellency, Luther H. Hodges,
"Governor of North Carolina

"We have received your communication of June 28, 1956, submitting to us the following question:

"'May the General Assembly, at its special session to be held in July, provide for the holding, prior to November, of a Statewide election, so as to meet the constitutional requirements of a general election, when the only questions which may be submitted to the electorate on the day designated for the election are the ratification or rejection of:

'(a) Constitutional amendments proposed by

Chapters 1169, 1245, and 1253 of the 1955 Session of the General Assembly, and

'(b) Such constitutional amendment or amendments as may be duly proposed at the special session of the General Assembly.'

"The undersigned, each for himself, answers the question posed in the affirmative: Provided, such election is held in conformity with the general election laws. See Opinions of the Justices, 204 N.C. 806 et seq., 172 S.E. 474 and 207 N.C. 879 et seq., 181 S.E. 557."

Respectfully,

M. V. BARNHILL
Chief Justice
J. WALLACE WINBORNE
EMERY B. DENNY
JEFF. D. JOHNSON, Jr.
R. HUNT PARKER
WM. H. BOBBIT
CARLISLE W. HIGGINS
Justices.

EDUCATION

Public Schools—Tennessee

Joheather McSWAIN et al. v. County BOARD OF EDUCATION OF ANDERSON COUNTY, Tennessee, et al.

United States District Court, Eastern District, Tennessee, August 29, 30, 1956, Civ. No. 1555.

SUMMARY: In a class action filed prior to the decision of the United States Supreme Court in the *School Segregation Cases*, the United States District Court had directed, on January 4, 1956, that the defendants, school officials of Anderson County, Tennessee, admit pupils to the county high school on a racially non-discriminatory basis beginning with the fall, 1956, school term. 1 Race Rel. L. Rep. 317. At the opening of the fall, 1956, term, the defendants petitioned the court for a restraining order, alleging that John Kasper and certain other persons were interfering with defendants' compliance with the court's order. On August 29, 1956, the court issued a temporary restraining order against several named and unnamed persons. The following day a petition for contempt citation was filed by the defendants against one John Kasper for having violated the restraining order. The court issued an order of attachment and subsequently convicted him of contempt. The primary documents in this case are reproduced below. (See also *Roy v. Brittain, infra*, p. 879.)

[Following is the petition filed by the original defendants, officials of the Clinton, Tennessee, high school, seeking a restraining order against interference with their carrying out the order of the court.]

To the Honorable Robert L. Taylor, Judge of the District Court for the United States of America for the Eastern District of Tennessee, Northern Division:

The petitioners are D. J. Brittain, Jr., Principal of Clinton High School, Anderson County, Tennessee, J. M. Burkhart, Member of the County Board of Education of Anderson County, Tennessee, W. B. Lewallen, Sidney Davis, and Walter E. Fischer, all citizens and residents of Anderson County, Tennessee, all of whom respectfully show to the Court:

I

That D. J. Brittain, Jr., was the principal of Clinton High School in Anderson County, Tennessee, when the cause in which this petition is filed was first begun, and that he still remains and is at the present time the principal of Clinton High School, Anderson County, Tennessee, and was and is a party defendant in Cause No. 1555 in the United States District Court for the Eastern District of Tennessee, Northern Division. That J. M. Burkhart was a member of the County Board of Education of Anderson County, Tennessee, when the cause in which this petition is being filed was begun, and that he is still a member of the County School Board of Anderson County, Tennessee, and was and is a defendant in Cause No. 1555 in the District Court of the United States for the Eastern District of Tennessee, Northern Division.

That Sidney Davis and W. B. Lewallen are attorneys at law in the Town of Clinton, Tennessee, and that they were employed by the defendants in Cause No. 1555 in the District Court of the United States for the Eastern District of Tennessee, Northern Division, to resist the efforts of Negro children entering Clinton High School in Anderson County, Tennessee. That as said attorneys and as citizens of Tennessee and the United States, they request permission of the Court to be petitioners in this cause.

That Walter E. Fischer is an attorney in the Town of Clinton, Tennessee, and that he is a citizen and resident of Anderson County, Tennessee, and of the United States and that he is an Assistant Attorney General for the Nineteenth Judicial Circuit of the State of Tennessee, and that he is interested in maintaining respect for the laws of Tennessee and the United States and respect for the District Court and the Supreme Court of the United States, and he requests permission to be allowed to be a petitioner in this cause.

II

That in this cause the Judge of this Honorable Court handed down an opinion in which the Court said, "It is the opinion of this Court that desegregation as to high school students in that county should be effected by a definite date and that a reasonable date should be fixed as one not later than the beginning of the fall term of the present year of 1956." Said opinion was filed on January 4, 1956, and the petitioners, D. J. Brittain, Jr., and J. M. Burkhart, were apprised of that fact, and in compliance with the opinion of this Honorable Court, Clinton High School was integrated at the fall term of 1956.

That during the spring of 1956, the petitioner, D. J. Brittain, Jr., in attempting to comply with the orders of this Honorable Court registered several Negro students for entry in the Clinton High School at the fall term 1956. On August 22, 1956, the student body of Clinton High School in Anderson County, Tennessee, reported to the high school and there received their schedule and other instructions pertaining to school administration during the school term of 1956-57. Regular class sessions at Clinton High School began August 27, 1956, and that in accordance with the orders of the United States District Court for the Eastern District of Tennessee, Northern Division, Negro students were admitted and have attended Clinton High School and are now attending Clinton High School.

III

That on August 25, 1956, a man by the name of John Kasper, who claims to be the Executive Secretary of the White Seaboard Council of the White Citizens Council, came to Clinton, Tennessee, and brought with him a quantity of scurrilous literature or pamphlets which attack the integrity of the Supreme Court of the United States and federal courts in general. The said John Kasper met with certain radical elements of Anderson County, Tennessee, and began the organization of a movement to prevent the defendants in this cause and the petitioners along with other responsible citizens of Clinton, Tennessee, and Anderson County, Tennessee, from obeying the orders of this Honorable Court. That the said John Kasper has stated that his sole purpose of coming to Clinton, Tennessee, was to prevent the integration of the races at Clinton High School and that he had full knowledge of the orders of this Honorable Court to integrate said high school by the fall term 1956, and that he advocates and advises his radical following to ignore the orders of this Honorable Court and to do all that they can to impede, obstruct, and intimidate the principal of Clinton High School and the County School Board of Anderson County, Tennessee, from carrying out the orders of this Honorable Court in the matter. That the said John Kasper made arrangements for the painting of signs to be used by pickets at Clinton High School, and that on Monday, August 27, 1956, there were picket lines in front of Clinton High School in Anderson County, Tennessee. That on Tuesday, August 28th, and Wednesday, August 29th, there continued to be a large crowd congregated near Clinton High School, and particularly near the entrance to the school, and that on August 29th, 1956, the crowds became so large and threatening that several Negro students were afraid to come to school and in at least one instance, a Negro child became so fearful that her parents came and removed her from the school. That the parents of some of the Negro children and also some of the white children have received threatening anonymous telephone calls because said parents were allowing their children to attend the same school. That John Kasper has been leading the movement and is lead-

ing the movement to intimidate the parents from sending their children to Clinton High School both in the Negro race and in the White race. That on August 28, 1956, the crowd of people, agitated by the propaganda of John Kasper, have actually attacked at least one Negro child. The said John Kasper has stated and is still stating to his radical following that the United States District Court for the Eastern District of Tennessee, Northern Division, had no authority to order integration of the races at Clinton High School and that that order should not be obeyed.

The petitioners allege that Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier, all of whom are citizens and residents of Anderson County, Tennessee, are the most radical followers of the said John Kasper, and that they are part of the crowd of some one hundred sixty-three persons congregated in and about Clinton High School. The petitioners allege that all of the above citizens named are actively advising the said crowd of people congregated around Clinton High School to ignore the orders of this Honorable Court and to do all they possibly can to impede the carrying out of said orders by the petitioners D. J. Brittain, Jr., J. M. Burkhart, and the other defendants named in Cause No. 1555 in the District Court of the United States for the Eastern District of Tennessee, Northern Division. All of the above named persons, namely John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier have stated that it is their avowed purpose to close down Clinton High School and to prevent students both white and colored from attending the high school so long as the defendants in Cause No. 1555 in the United States District Court for the Eastern District of Tennessee, Northern Division, allow integration of the races at Clinton High School in Anderson County, Tennessee, in accordance with the orders of this Honorable Court and in accordance with the decision of the Supreme Court of the United States.

The petitioners allege that they have been unable to obtain the names of all of the people congregating about Clinton High School and urging disregard of the orders of this Honorable Court and who are actively attempting to prevent the petitioners from carrying out the orders of this Honorable Court, but they allege that not only John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier should be enjoined from congregating about Clinton High School in Anderson County, Tennessee, and from encouraging the people of Anderson County, Tennessee, to ignore the orders of this Honorable Court and from attempting to intimidate the students of Clinton High School, both white and colored, but that all persons who are participating with them in this enterprise and who might participate in the future in said unlawful enterprise should be so enjoined.

The petitioners file this petition under the provision of Title 18, Section 401, of the Federal Code, which reads as follows:

> **"Section 401.** Power of Court.—A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none others, as—
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The petitioners allege that John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier had knowledge that this Honorable Court had issued an order to petitioners to integrate Clinton High School by the fall term 1956, and that by their actions in attempting to prevent, impede, and obstruct the carrying out of the orders of this Honorable Court and their contemptuous attitude toward the Courts of the United States and its orders in regard to the integration of the races amounts to a contempt of this Honorable Court. The Petitioners allege that the foregoing named persons, and especially John Kasper, should be immediately attached by this Honorable Court and brought before it to show cause why the Court should not fine or imprison him, or both, for his contemptuous conduct.

The petitioners allege that John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier and other persons who join them in their contemptuous attitude toward the orders of this Honorable Court will continue to attempt to prevent and impede the petitioners from carrying out the orders of this Honorable Court in regard to integration of the races at Clinton High School unless they are enjoined from congregating around Clinton High School and from threatening the parents of both white and Negro children who allow their children

to attend Clinton High School and from doing any act which would obstruct or impede the integration of Clinton High School in Anderson County, Tennessee, in accordance with the orders of this Honorable Court and the opinion of the Supreme Court of the United States of America.

IV

THE PREMISES CONSIDERED, the petitioners pray:

1. That the petitioners W. B. Lewallen, Sidney Davis, and Walter Fischer be allowed to join D. J. Brittain, Jr., and J. M. Burkhart as petitioners in this cause.

2. That this petition be filed and that proper notice of same be given John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier, and any and all persons who join with John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier in an attempt to obstruct or impede the carrying out of the orders of this Honorable Court in regard to integration at Clinton High School in Anderson County, Tennessee.

3. That an injunction issue enjoining John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, Mabel Currier, and any and all persons who might join with said persons in obstructing or impeding the carrying out of the orders of this Honorable Court to integrate the races at Clinton High School in Anderson County, Tennessee, and further enjoining said persons from doing any act to obstruct or impede by intimidation or oppression or by the gathering in large groups in and about Clinton High School in Anderson County, Tennessee, to prevent petitioners from carrying out the orders to integrate the races at Clinton High School in Anderson County, Tennessee, as indicated in an opinion by this Honorable Court filed January 4, 1956.

4. That the Court issue an attachment for the body of John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, and Mabel Currier, requiring said persons to appear before the Court and show cause why they should not be held in contempt of the orders of this Honorable Court and fined or imprisoned, or both, for their contemptuous conduct as set out in this petition, and that said persons be required to make bond for their appearance before Your Honor.

5. That at the hearing of this cause, an injunction issue permanently restraining John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton, Mabel Currier, and any other persons from congregating in front of Clinton High School for the purpose of obstructing or impeding the petitioners from integrating the races at Clinton High School in Anderson County, Tennessee, in accordance with the orders of this Honorable Court and the decision of the United States Supreme Court.

6. That petitioners have such other and further relief, including general relief, as Your Honor deems them entitled to.

This is the first application for extraordinary process in this cause.

[The temporary restraining order (injunction) issued by the District Court on August 29, 1956, follows.]

TAYLOR, District Judge

TEMPORARY RESTRAINING ORDER

In this cause it appearing from sworn petition of D. J. Brittain, Jr., J. M. Burkhart, W. B. Lewallen, Sidney Davis and Walter E. Fisher that John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton and Mabel Currier and others whose names are not known by the petitioners at this time, are hindering, obstructing, and interfering with the carrying out of a memorandum order issued by this Court on January 1, 1956, in that, among other things, they have requested and urged the principal of the Clinton High School and the members of the County School Board of Anderson County to refuse to carry out the aforesaid integration order of the Court; that they have formed and caused to be formed picket lines in front of Clinton High School of Anderson County and on August 28 and 29, 1956, caused a large crowd to form near the entrance to Clinton High School, and threatened and caused to be threatened several of the Negro students attending said high school, causing them in at least one instance to become afraid to attend school, and causing the parents of the students to become frightened and alarmed, one of whom caused a

child to be removed from school; that anonymous letters have been written to parents of the students threatening them for permitting their children to attend school; that John Kasper has been one of the leaders in what appears to be a concerted movement to intimidate the parents, or some of them, who are sending their children to school, in an effort to prevent a continuation of school attendance; that on August 29, 1956, a crowd of people agitated by John Kasper attacked one of the Negro children of the school; that Kasper stated on various occasions that the Court had no authority to issue the aforesaid order of desegregation in the Clinton High School, and that it should not be obeyed.

It further appearing to the Court that the unlawful conduct of Kasper and the other named parties herein will continue unless a restraining order is issued prohibiting such acts, words, and conduct, and that if continued complainants will suffer immediate and irreparable injury, in that the Clinton High School will not continue to operate in an orderly manner and some of its students may suffer physical harm;

It is ordered and decreed by the Court that the aforementioned persons, their agents, servants, representatives, attorneys, and all other persons who are acting or may act in concert with them be and they hereby are enjoined and prohibited from further hindering, obstructing, or any wise interfering with the carrying out of the aforesaid order of this Court, or from picketing Clinton High School, either by words or acts or otherwise.

It is further ordered that the aforementioned parties appear before this Court in the Federal Court House, Knoxville, Tennessee, at 1:00 o'clock p. m. on Thursday, August 30, 1956 and show cause why a preliminary injunction should not be issued.

This temporary restraining order is granted without notice to Kasper, Carter, Stiles, Hankins, Bolton, and Mabel Currier because of the matters hereinbefore set out and other matters of like tenor set forth in the complaint, and because it has been made to appear to the Court that immediate action is necessary to prevent possible harm to the students of Clinton High School.

[On August 30, 1956, the school officials of Clinton, Tennessee, filed a petition for contempt against one John Kasper for having violated the above restraining order. That petition and an accompanying affidavit follow.]

PETITION FOR CONTEMPT

The petitioners, D. J. Brittain, Jr., J. M. Burkhart, Sidney Davis, F. Buford Lewallen, and Walter E. Fischer, being the same petitioners in the intervening petition filed in this cause on the 29th day of August, 1956, respectfully show unto Your Honor:

I

That pursuant to the restraining order issued by Your Honor on the 29th day of August, 1956, at 6:07 p.m. at Your Honor's offices and chambers in the Federal Court House Building in Knoxville, Tennessee, the defendant, John Kasper, one of the defendants named in said restraining order, was duly served with said restraining order by the United States Marshal while the defendant was on the Court House steps or within the Court House building within the Town of Clinton, Tennessee, at approximately 7:45 p.m on the 29th day of August, 1956.

II

Immediately upon receiving the aforesaid restraining order from the Marshal of the United States District Court, the said defendant, John Kasper, immediately stepped outside of the Court House door in the Town of Clinton, Tennessee, where a large crowd of approximately eight hundred to one thousand people had gathered as per prearrangements made by the defendant, John Kasper, and announcement by him during the preceding hours of the day, and the said John Kasper began to address the crowd. The defendant looked at the restraining order in front of the crowd while standing on the Court House steps and said, "I have just been served with an injunction from the Federal Court." "We will now find out who our enemies are." He then proceeded to read the names of the petitioners. He called out the name of the petitioner, D. J. Brittain, Jr. He then called out to the crowd assembled, "He is our enemy." "We

must get him." "I will not allow your children to be deprived of an education because a weak-kneed man like Brittain refuses to push those niggers out of school." While addressing the crowd, the defendant, John Kasper, further stated, "I will stay here until those niggers are out of Clinton High School." The petitioners further allege and show to the Court that the defendant Kasper then proceeded to tell his audience that those persons not specifically named in the restraining order could go ahead with their activities over at the Clinton High School. He further stated that the Federal Courts could serve all sorts of restraining orders on them, but that they did not have to obey said restraining orders unless they wanted to.

III

Petitioners further show to the Court that the defendant Kasper, on the morning of August 30th at approximately eight o'clock a.m., appeared in front of the high school grounds in the Town of Clinton, Tennessee, remaining some two hundred feet away from the main entrance door of said high school and standing apart from the large gathering or group of persons gathered there, proceeded to stop individuals walking up and down the street and converse with them in the general locality where large groups were gathered. The petitioners allege and show to the Court that the defendant Kasper's presence was designed, on this occasion, to further violate the orders of this Honorable Court. The petitioners aver that all of the above acts and conduct on the part of the defendant Kasper were in direct violation of the orders of this Honorable Court; and that his conduct was in wilful disregard of the order of this Court; and that the said defendant, John Kasper, is guilty of a criminal contempt of Your Honor's Court, under Title 18, Section 401, Subsection 3, of the United States Code Annotated.

The petitioners therefore pray that Your Honor issue an order of arrest for the person of John Kasper for criminal contempt of the orders of this Honorable Court, and that he be brought before Your Honor instanter to answer for his aforesaid contempt in accordance with law.

The petitioners further pray that they be allowed to file this petition for contempt against the defendant, John Kasper, along with any accompanying affidavits attached thereto.

[AFFIDAVIT]

COUNTY OF ANDERSON)
STATE OF TENNESSEE)

JAMES LOGGANS, being duly sworn before the undersigned authority, makes oath as follows:

That he is thirty-six years of age and is a citizen and resident of Knox County, Tennessee. That he is the news editor of The Clinton Courier-News, located in the Town of Clinton, Tennessee. That he has been on the scene during most of the daylight and part of the night hours since the opening of the Clinton High School on August 27th up until the time of the making of this affidavit on this the 30th day of August 1956 at 9:30 a.m. That on August 28th, in the Court House in Clinton, Tennessee, the affiant interviewed the defendant John Kasper, and the defendant John Kasper told the affiant that he "would stay right here until the Principal, D. J. Brittain, and the School Board resigns if necessary." Affiant further states that the defendant Kasper further told him on this occasion that he planned to remain here, help the fellows on the picket line, keep on organizing and distributing legal literature, and planned to have a rally here tonight or tomorrow. The affiant further makes oath that the defendant Kasper's attorney inserted the words "legal literature." Affiant further makes oath that the defendant Kasper told him his age was twenty-six and that his birthplace was Camden, New Jersey. Affiant further makes oath that the defendant Kasper told him that he organized this White Citizens Council on June 5, 1956.

Affiant further makes oath that he was present at the Court House in the Town of Clinton, Tennessee, on August 29th at approximately 7:45 p.m., when the United States Marshal served an injunction on the defendant, John Kasper. Affiant further states that the defendant came out on the steps of the Court House and announced to the crowd that an injunction had been served on him, held it up before the crowd and stated that he would have something to say about it later on. That the defendant then started on various harangues concerning the Constitution, Negroes, or "niggers", and others. The defendant further stated that the people could go ahead and continue their activities here as they did Monday, Tuesday, and Wednesday if these persons are not specifically named in this order. The defendant further states, "I

may not participate in these activities further, but I will remain here." The defendant then further made personal attacks upon the petitioners in the petition as named and said, "I will not allow these children to be deprived of an education because Brittain refuses to push those 'niggers' out of school." Kasper further stated, "I will stay here until those niggers are out of Clinton High School." During the defendant's tirade, he further stated, "The Federal Court can file every kind of injunction and enjoin you, but as long as that school is there, and so forth, no injunction can force you to do something you don't want to do." Affiant further states that the defendant then criticized the Knoxville News Sentinel, the Knoxville newspapers, and the Clinton Courier-News, and Mr. Wells, the publisher of the Clinton Courier-News personally. Affiant further states that the defendant said "I will stay here until those niggers are out of Clinton High School." Affiant further states that Kasper stated that he urged or asked the audience to join him in his council "to fight negroism." Affiant further states that the defendant Kasper then talked about the injunctive order which had been served upon him, and invited them to come to Knoxville to the hearing. That later on the defendant Kasper, however, told the audience that it is far more important for you to be here "two blocks away". Affiant further states that Kasper then stated that the "big shots will be little shots before this thing is over." Kasper further stated, "We will carry the fight on until we win, tomorrow night and every night until this is over we will be right here."

Further the affiant sayeth not.

s/ James Loggans

[Pursuant to the above petition, an order of attachment was issued by the District Court on August 30, 1956, against John Kasper.]

TAYLOR, District Judge.

ORDER FOR ATTACHMENT

It appearing to the Court from a sworn petition for contempt by petitioners D. J. Brittain Jr., et al., that a temporary restraining order was issued by this Court at 6:07 p.m., August 29, 1956, restraining John Kasper, Tom Carter, Max Stiles, Ted Hankins, Leo Bolton and Mabel Currier, and all other persons who are acting, or may act, in concert with them, from impeding, hindering, obstructing, or in any wise interfering with the carrying out of an order issued by this Court on January 4, 1956, directing the school authorities of Anderson County, Tennessee, to discontinue segregation practices in the Clinton High School, and that soon after said order was served by the United States Marshal for the Eastern District of Tennessee on John Kasper, that the said John Kasper addressed a large crowd of people in Clinton in which he said to them in substance as follows: ". . . now we shall find out who our enemies are." He read the names of the petitioners. He called out the name of D. J. Brittain. He called out "He is our enemy. We must get him. I will not allow these children to be deprived of an education because Brittain (Brittain is the principal of the Clinton High School and one of the petitioners herein) refuses to push those niggers out of school. . . . , I will stay here until those niggers are out of the Clinton High School. . . . Those people not specifically named in the restraining order, could go ahead with their activities over at the Clinton High School if they were not specifically named in the order."

It further appears from the averments of the petition and affidavits that John Kasper at the aforesaid time and place wilfully disregarded the order of this Court and committed a criminal contempt of this Court as defined by Title 18, Sec. 401, sub-sec. 3 of the U.S. Code, Annotated.

It is ordered that a writ of attachment be forthwith issued commanding the Marshal of this Court and his deputies to attach said John Kasper and have his body before this Court in the United States Courthouse at Knoxville, Tennessee, forthwith, to stand trial upon the charge of criminal contempt set out in this order and to show cause why he should not be punished therefor and that a copy of this order be served upon the said John Kasper at the time he is apprehended,

That the Clerk of this Court will transmit to the Marshal an original and attested copy of said attachment and two attested copies of this order dated August 30, 1956.

[The judgment and commitment of the District Court, styled *In The Matter of John Kasper*, Civ. No. 1555, on August 31, 1956, adjudging John Kasper guilty of criminal contempt of the court follows.]

TAYLOR, District Judge.

[JUDGMENT AND COMMITMENT]

On this 31st day of August, 1956, came the attorney for the petitioners, D. J. Brittain, Jr., J. M. Burkhart, Sidney Davis, W. Buford Lewallen, and Walter E. Fischer, and the defendant, John Kasper, appeared in proper person and by attorney

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty, of the offense of wilfully violating the provisions of the temporary restraining order issued by this Court at 6:07 P.M. on August 29, 1956 as charged in the writ of attachment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged of criminal contempt of this Court.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR from and after this date.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

EDUCATION

Public Schools—Tennessee

John E. ROY et al. v. D. J. BRITTAIN, Jr., et al.

Chancery Court of Anderson County, Tennessee, August 25, 1956, No. 6727.

SUMMARY: Negro school children in Anderson County, Tennessee, had obtained an injunction in federal district court requiring their admission to a public high school in that county without regard to race or color. *McSwain v. Board of Education of Anderson County*, 1 Race Rel. L. Rep. 317 (E.D. Tenn. 1956) (see also p. 872). Prior to the beginning of the 1956 school term, at which the admission of the Negro children had been ordered, citizens of that county brought a bill in a Tennessee state court against school officials seeking an injunction to require the school officials not to admit the Negroes to the school. Grounds assigned for the issuance of an injunction were that the Tennessee statutory and constitutional provisions requiring racially separate schools were valid and enforceable and that there was a prohibition against spending state funds for integrated schools. The chancellor denied the granting of an injunction.[a] (See also *Davidson v. Cope*, 1 Race Rel. L. Rep. 523 (Tenn. Ch. Ct., 1956)). The opinion of the chancellor denying the injunction is set out below, following which is set out the bill of complaint which was filed in the case.

CARDEN, Chancellor.

In this cause there has been presented to the Court a bill seeking, ex parte, a temporary injunction.

After a careful review of the bill and authorities, I have come to the conclusion that complainants are not entitled to this extraordinary writ. Particularly is this true in view of the fact that the bill shows on its face that the United States District Court for the Eastern District at Knoxville has handed down a decision ordering these same defendants to do the thing about which petitioners herein complain.

It results that the application is denied.

a. On September 3, 1956, the Tennessee Supreme Court declined to review the decision of the chancellor by a writ of certiorari. After stating that the Court had been expecting to receive such a question, NEIL, Chief Justice, announced in open court in part, "We are unanimous that the question is fully foreclosed by the United States Supreme Court decision."

BILL OF COMPLAINT

The Complainants would respectfully show to the Court:

I.

That they are citizens and taxpayers of Anderson County, and of the State of Tennessee; that each of them has paid and does pay taxes, which have gone and do go into the General Fund of the State of Tennessee, and into the funds of Anderson County, Tennessee; that they, therefore, are and will be vitally affected by any money drawn from the Treasury of the State of Tennessee, or of Anderson County, not in consequence of any appropriation made by law, as well as by any unlawful appropriations and unauthorized diversions of any moneys from either the General Fund of the State of Tennessee, or of Anderson County, and that any money drawn from said Treasurys not in consequence of any appropriations made by law, as well as any such unlawful appropriations and unauthorized diversions of money, would impose an additional burden of taxation upon these Complainants and on others similarly situated. This cause is brought by these Complainants as said taxpayers aforesaid, because of the necessity of prompt action to prevent irremediable public injury.

II.

That the Defendant, D. J. Brittain, Jr., is the Principal of the Clinton High School, at Clinton, Tennessee, and as such is the ministerial or clerical head of said school and is the servant of the School Board of Anderson County, Tennessee.

That the Defendant, George W. Ridenour, is the duly elected Trustee of Anderson County, Tennessee, and as such draws checks on the school fund of Anderson County for payment of expenses, including the payment of the salaries of Teachers in the Anderson County, Tennessee, Schools, and other expenses.

That the Defendant, Frank E. Irwin, is the County Superintendent of Schools of said Anderson County, and as such signs the warrants upon the basis of which the checks are issued by said Defendant, Ridenour, the Trustee aforesaid.

That the Defendant, Chester E. Hicks, is Chairman of the School Board of said Anderson County, and as such signs the warrants along with said Irwin, aforesaid, upon the basis of which the checks for said school expenses are issued by said Defendant, Ridenour, the Trustee, aforesaid.

III.

That by virtue of Chapters 136 and 229, of the Public Acts of 1955, the General Assembly of the State of Tennessee enacted laws known as the "General Appropriations Bill" and the "General Education Appropriations Act," whereby there was appropriated for the current operation and maintenance of public schools of the State of Tennessee, grades 1 through 12, $74,879,200.00 for the fiscal year 1955-56, and $79,866,900.00 for the fiscal year 1956-57, upon certain conditions therein set out. These Acts took effect from and after July 1, 1955. The Clinton High School receives its pro-rata share of this money.

IV.

By Chapter 6 of the Public Acts of 1955, pages 53-4 the 79th General Assembly of the State of Tennessee enacted into law as the official Tennessee Code, the "Tennessee Code Annotated," which by the terms thereof became effective and the statutory laws of the State of Tennessee, as of January 1, 1956.

At the time of the enactment of the Tennessee Code Annotated, there was in existence the now notorious Segregation Cases decided by the United States Supreme Court, of Brown vs. Board of Education of Topeka, Kansas, and four other cases, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686, which were decided on May 17, 1954.

The General Assembly of the State of Tennessee, having full knowledge of said opinion of the United States Supreme Court, thus on February 2, 1955, enacted the Tennessee Code Annotated, which contains the following provisions:

> "49-1005. *Assignment of Children to Schools.*—The County board of education shall designate the schools where the children shall attend; provided, that separate schools shall be established and maintained for white and negro children."

This provision applied to elementary schools. The Legislature further enacted the following:

> "49-1107. *Pupils admissible—Segregation.* —. . . senior high schools of four (4) grades shall be open to all children of the county who have completed the eight (8) grades of the elementary school or their equivalents; and senior high schools of three (3) grades

shall be open to all children of the county, who have completed the 9th grade, or its equivalent, in a junior high school, provided, that separate schools shall be maintained for white pupils and negro pupils."

And further the 1955 General Assembly passed the following law in the face of the United States Supreme Court opinion:

"49-3701. *Interracial schools prohibited.*—It shall be unlawful for any school, academy, college, or other place of learning to allow white and colored persons to attend the same school, academy, college, or other place of learning."

"49-3702. *Teaching of mixed classes prohibited*—It shall be unlawful for any teacher, professor, or educator in any college, academy, or school of learning, to allow the white and colored races to attend the same school, or for any teacher or educator, or other person to instruct or teach both the white and colored races in the same class, school, or college building, or in any other place or places of learning, or allow or permit the same to be done with their knowledge, consent, or procurement."

"49-3703. *Penalty for violation.*—Any person violating any of the provisions of this chapter, shall be guilty of a misdemeanor, and, upon conviction, shall be fined for each offense fifty dollars ($50.00) and imprisonment not less than thirty (30) days nor more than six (6) months."

V.

The Constitution of the State of Tennessee, Article 2, §24, reads as follows:

"Sec. 24. No money shall be drawn from the treasury but in consequence of appropriations made by law; . . ."

Thus by the terms of the Constitution of the State of Tennessee the appropriation of public funds and the expenditure thereof must be according to law. The General Assembly of the State of Tennessee for the year 1955 in its regular session, there being no extraordinary sessions, has passed no law permitting white and colored students to attend classes together in the public schools of the State of Tennessee.

To the contrary, the 1955 Legislature has enacted laws prohibiting colored and white students from attending class together and being taught together, clearly indicating the intention of the Legislature that all money appropriated under the appropriation bill above set forth, should be expended only in segregated schools.

Nowhere in the laws of the State of Tennessee is there any authority of any kind whereby one single cent of the public funds of the people of the State of Tennessee may be appropriated or spent for desegregated or so-called "integrated" public schools.

To the contrary, the 1955 Legislature has ordered segregation and appropriated money for schools where white and colored students do not attend together, but attend schools provided for their respective races. This is in compliance with Section 12 of Article 11 of the Constitution of the State of Tennessee, which being in full force and effect today, provides in part:

"No school established or aided under this section shall allow white and negro children to be received as scholars together in the same school."

In a lawsuit instituted in the United States District Court for the Eastern District of Tennessee, some time prior to April 26, 1952, entitled Joheather McSwain, et al, vs. County Board of Education of Anderson County, Tennessee, et al, the Court, on January 5, 1956, in an opinion by Judge Robert Taylor, dismissed a motion for summary judgment and granted a motion for a final decree that desegregation as to high school students in Anderson County should be effected by a definite date, and that a reasonable date should be fixed as one not later than the beginning of the fall term of the present year 1956, and that the decree provided that segregation as to high school students in Anderson County be discontinued as of the time above indicated.

One of the defendants in that cause, D. J. Brittain, Jr., Defendant herein, without any authority from the School Board of Anderson County, Tennessee, but on his own initiative, has proceeded to enroll twelve (12) negro students in said Clinton High School for the fall term, which commenced August 20, 1956, and classes of which will start on August 27, 1956.

Said twelve (12) negro students will attend classes as at said Clinton High School, Clinton, Tennessee, with white students who are also

enrolled there. The said twelve (12) negro students will take the same subjects and attend the same classes and courses of instructions with the said white students.

VII.

The Complainants aver that the action of the said D. J. Brittain, Jr., in directing this so-called "integration" is without any authority in law, express or implied, and is the ultra vires act of a ministerial or clerical employee or servant of the Board of Education of said Anderson County, not even rising to the status of a de facto act.

It is further alleged that said authority to change the public schools of the State of Tennessee from a segregated basis to an integrated or mixed-racial basis is vested not in a clerical or ministerial employee, but in the entire people of the State of Tennessee through their duly elected representatives in the Legislature of the State of Tennessee.

Complainants further allege that the action of said Defendant, Brittain, in announcing that negroes would be admitted to the said Clinton High School, in Clinton, Tennessee, is absolutely void, illegal and of no effect, being without any authority under the law and that no officer or employee of the State of Tennessee, of the School Board of Anderson County, Tennessee, of the County Court of Anderson County, Tennessee, or any other person, is entitled to rely upon it.

It is further alleged that the segregation laws of the State of Tennessee are in full force and effect at the present time, and that the 1955 General Assembly in enacting the new Tennessee Code Annotated expressly directed that white students only be admitted to the public schools of the State of Tennessee, made and provided for white students, and directed that negroes be admitted to the schools provided for negroes.

VIII.

The United States Supreme Court has not decided that Federal Courts are to take over, or regulate the public schools of the states. Nor has it decided that the states must mix persons of different races in the schools, or must require them to attend schools, or must deprive them of the right of choosing the schools they attend. It has held that the Constitution does not require integration, but merely forbids discrimination. This has been held by a Federal Court and so far as Complainants' counsel can ascertain, has not been overruled. The Legislature of the State of Tennessee, speaking for the people of the State, may entirely abolish our public school system and still comply with the ruling of the United States Supreme Court. There are many other methods that may be used by the Legislature in complying with the United States Supreme Court's segregation decision.

Complainants, therefore, allege that above described decree of the United States District Court for the Eastern District of Tennessee, in the case of McSwain against the County Board of Education of Anderson County, Tennessee, if it is interpreted to mean forced integration by September 1956, that same is in violation of the United States Supreme Court's decision rendered in the Brown vs. Board of Education of Topeka, et al. Complainants allege that said decision of Judge Taylor in the McSwain case does not require forced integration by September 1956, and that compulsory integration is unlawful, unconstitutional and void.

IX.

Complainants further aver that unless Defendant Brittain, is restrained from carrying out this unconstitutional, illegal and void action by this Honorable Court, that the people of the State of Tennessee will sustain irreparable damage and that your Complainants will sustain damage through an unconstitutional and unlawful diversion of the moneys of the State of Tennessee and of Anderson County. They further aver that the said Defendants, Irwin, as Superintendent of Schools of Anderson County, and Hicks, as Chairman of the School Board of Anderson County, will isue County warrants for the payment of the expenses of said Clinton High School, and that on the basis of said warrants said Defendant Ridenour, Trustee of said Anderson County, will issue checks based on said warrants in payment of said expenses of said Clinton High School, which will result in an unlawful and illegal diversion of the funds of the State of Tennessee and of Anderson County, Tennessee, unless said Defendants, Hicks, Irwin and Ridenour are restrained from so doing by this Honorable Court, so long as said negro students aforesaid attend the Clinton High School with white students.

Complainants further allege that said Complainants and all other persons whose taxes

go into the General Fund of the State and into the Treasury of Anderson County, Tennessee, will be damaged, in that this unauthorized appropriation and unlawful expenditure of the State funds will of necessity have to be made by additional or increased taxes and that the payment of these sums of necessity increase the tax burden of these Complainants; that the payment of such sums will result in irreparable injury to these taxpayers and to all other taxpayers similarly situated, and to the State of Tennessee.

X.

It is further alleged that said Defendant, Brittain, as principal of said High School, is subject at all times to the supervision and control of the School Board, which is the governing body of said School in all activities connected with the business of the School, and that he cannot, in violation of the laws of the State of Tennessee, perform acts for which he has no authority, and which are contrary to the public policy of the State of Tennessee.

To the contrary, it is alleged that the action attempted to be taken by the Defendant Brittain is not even delegated to the School Board of Anderson County, Tennessee, which, under Code Section 49-214 of the Tennessee Code Annotated, has the duty to manage and control all County public schools established, or that may be established, and has many other specifically authorized duties set out in said Code Sections of the State of Tennessee.

Recognizing that it had no such authority, the School Board of Anderson County, Tennessee, has taken no action to mix colored and white students in said Clinton High School. The rashness of said employee of the said School Board, Defendant Brittain, in endeavoring to mix white and colored students in said High School, appears in bold relief in contrast with the lawful action of the said School Board itself, in whom so many powers and duties are entrusted, one of which is not to change the public policy of the entire State of Tennessee, without the authorization of the people of the State through its duly elected representatives.

XI.

Complainants further aver that the officials who would ordinarily bring such a suit as this, have, or may have, interest antagonistic to this suit, and may, or would be embarrassed by its maintenance, and that, therefore, these Complainants are entitled to bring this suit on behalf of the State of Tennessee, and of Anderson County, Tennessee.

THE PREMISES CONSIDERED, THE COMPLAINANTS, THEREFORE, PRAY:

1. That subpoena to answer issue against the said Defendants, requiring them and each of them, to answer this bill; but their oaths to their answers are expressly waived.

2. That a writ of injunction issue to restrain and enjoin the Defendant, D. J. Brittain, Jr., Principal of the Clinton High School, of Anderson County, Tennessee, from allowing, permitting, directing, instructing, or forcing the said twelve (12) negro students, or any other negro students, to enroll at the said Clinton High School, at Clinton, Anderson County, Tennessee, or to attend classes with white students at said institution, and at the hearing said injunction be made permanent.

3. That a writ of injunction issue to restrain and enjoin the defendants, Frank E. Irwin, Superintendent of Schools of said Anderson County, Tennessee, and Chester E. Hicks, Chairman of the Board of said Anderson County School Board, from issuing warrants for the payment of the expenses of said Clinton High School, at Clinton, Anderson County, Tennessee, so long as the said twelve (12) negroes or any other negroes are enrolled at said institution and attend classes with white students at said institution.

4. That a writ of injunction issue to restrain and enjoin the Defendant, George W. Ridenour, Trustee of said Anderson County, from honoring any warrants drawn on said County, and in issuing any checks in payment of any public funds out of the funds in his hands from expenses of said Clinton High School, so long as said twelve (12) negroes are enrolled, or any other negroes are enrolled, or attend classes at said institution with white students, and that at the hearing said injunction be continued as long as any negroes attend classes with students at said institution.

5. That these Complainants have a declaratory judgment declaring that the action of the said Defendant, D. J. BRITTAIN, JR., Principal of said Clinton High School in directing the so-called integration or enrollment of the negro students with white students at said Clinton

High School, at Clinton, Anderson County, Tennessee, is illegal, void, unauthorized and of no effect, and that the public funds of Anderson County and of the State of Tennessee will not be expended pursuant to said action of said defendant Brittain.

6. That the Complainants have such further and other relief as the nature of the suit may require, and as may be according to good conscience.

THIS IS THE FIRST APPLICATION FOR AN INJUNCTION IN THIS SUIT

s/ Sims Crownover
Solicitor for Complainants

EDUCATION
Public Schools—Texas

Nathaniel JACKSON, a minor, by his father and next friend, W. D. Jackson, et al. v. O. C. RAWDON, as President of the Board of Trustees, Mansfield Independent School District, et al.

United States District Court, Northern District, Texas, August 27, 1956, Civ. No. 3152.

SUMMARY: Negro school children of the Mansfield Independent School District in Texas brought a class action in federal district court seeking a declaratory judgment and injunctive relief against school officials of that District with respect to their right to be admitted to public schools without regard to race or color. The district court dismissed the action without prejudice, holding that injunctive relief under the circumstances would be "precipitate and without equitable justification." 135 F.Supp. 936, 1 Race Rel. L. Rep. 75 (1955). On appeal the United States Court of Appeals for the Fifth Circuit reversed and remanded, holding that plaintiffs were entitled to a declaration of their right to attend public school without regard to race or color and to a prompt start, "uninfluenced by private and public opinion as to the desirability of desegregation in the community," by the board to effect desegregation of the school. Civ. No. 15927, 1 Race Rel. Rep. 655 (1956). On the remand the district court enjoined the school officials from refusing admission to the high school to the plaintiffs and retained jurisdiction of the case to supervise the carrying out of the decree.

ESTES, District Judge

DECREE

The above cause came on regularly for trial before the Court on the 7th day of November, 1955, and the Court, after filing a Memorandum Decision in lieu of Findings of Fact and Conclusions of Law, entered Judgment herein on the 23rd day of November, 1955, dismissing this case without prejudice, and thereafter the plaintiffs herein prosecuted an appeal from that judgment to the United States Court of Appeals for the Fifth Circuit, and the last mentioned Court reversed the Judgment of this Court entered herein on the 23rd day of November 1955.

Thereafter the Mandate of the United States Court of Appeals for the Fifth Circuit was handed down by that Court in this cause on August 17, 1956, directing the judgment and decree that should be entered by this Court in this cause.

Therefore, in accordance with said mandate, it is ADJUDGED and DECREED that the minor plaintiffs, Nathaniel Jackson, Charles Moody, and Floyd Stevenson Moody, and all other negro minors of the same class as the named minor plaintiffs, have the right to admission to, and to attend the Mansfield High School on the same basis as members of the white race, and that the refusal of the defendants to admit plaintiffs thereto on account of their race or color is unlawful.

It is further ORDERED, ADJUDGED and DECREED that Defendants, O. C. Rawdon, Ira Gibson, Billy Arbor, Hubert Beard, Horace Howard, O. M. Wilshire, and J. R. Lewis, as officers and members of the Board of Trustees of the Mansfield Independent School District, and R. L. Huffman, as Superintendent of Public Schools of the Mansfield Independent School District, and the Mansfield Independent School District, a body corporate, their agents, their servants, their employees, their successors in office, and all other persons acting in concert

with them, be and they and each of them, are hereby forever restrained from refusing admission to Mansfield High School to any of the plaintiffs shown to be qualified in all respects for admission.

It is further ADJUDGED and DECREED that all costs incurred in this cause in the United States Court of Appeals for the Fifth Circuit, in the amount of $283.75, and all costs incurred in this cause in this Court, be and the same are hereby adjudged against the Defendants, in solido, for all of which execution shall issue out of this Court.

It is further ORDERED and DECREED that jurisdiction of this cause will be retained for further orders at the foot of this decree to promptly, fully, and effectively carry out this decree, all in accordance with the Mandate of the United States Court of Appeals for the Fifth Circuit issued in his cause.

Following the entry of the above decree on remand, disorders arose at the Mansfield schools upon the application of Negroes for admission. Governor Allan Shivers of Texas issued the following statement in connection with the steps taken by him in such disorders:

OFFICE OF THE GOVERNOR

August 31, 1956

STATEMENT BY THE GOVERNOR:

In view of the threat to the public welfare resulting from the unfortunate situation at Mansfield, I have taken the following steps:

1. Under the general powers of the Governor to enforce the laws and see that order is kept in Texas, I have instructed Colonel Garrison to send Texas Rangers to Mansfield to cooperate with local authorities in preserving the peace.

2. I have talked by telephone with R. L. Huffman, superintendent of the Mansfield schools, and have wired O. C. Rawdon, president of the Mansfield School Board, urging that the Board go ahead and transfer out of the district any scholastics, white or colored, whose attendance or attempts to attend Mansfield High School would reasonably be calculated to incite violence. These transfers should be for the general welfare, to preserve peace and orderly conduct, and not for any other reason. This action would be in line with the U. S. Supreme Court decision in the Lucy Case in Alabama.

3. I have asked Colonel Garrison to instruct his men to arrest anyone, white or colored, whose actions are such as to represent a threat to the peace at Mansfield.

Contrary to the contentions of the NAACP lawyers, the legal recourse of the Mansfield School District has NOT been exhausted. There still remains an appeal to the United States Supreme Court itself for a stay of the order directing admittance of Negro students to Mansfield High School. Personally I hope that the U. S. Supreme Court will be given an opportunity to view the effect of its desegregation decision on a typical law-abiding Texas community.

I am taking this action not in a spirit of defiance of federal authority but as the only course I can conscientiously pursue in upholding my constitutional responsibility for maintaining law and order in Texas. Should the resulting actions on part of the Mansfield school authorities be construed as contempt of the federal courts, I respectfully suggest that the charge should be laid against the Governor and not the local people.

It is not my intention to permit the use of state officers or troops to shoot down or intimidate Texas citizens who are making orderly protest against a situation instigated and agitated by the National Association for the Advancement of Colored People. At the same time we will protect persons of all races who are not themselves contributing to the breach of peace. If this course is not satisfactory under the circumstances to the federal government, I respectfully suggest further that the Supreme Court, which is responsible for the order, be given the task of enforcing it.

EDUCATION

Public Schools—Virginia

Doris Marie ALLEN et al. v. The SCHOOL BOARD OF THE CITY OF CHARLOTTESVILLE, et al.

United States District Court, Western District, Virginia, August 6, 1956, Civ. No. 51.

SUMMARY: A class action was brought in federal district court by Negro school children in Charlottesville, Virginia, against the city school board and superintendent of schools seeking to require the admission of the plaintiffs to public schools in that city without regard to race or color. At the trial objection was raised that the suit was a suit against the state of Virginia to which the state has not consented. The court ruled against this contention and held that the plaintiffs were entitled to the injunctive relief prayed for. The injunction against discrimination on the basis of race or color by the defendants in the admission of children to public schools was made effective as of the beginning of the 1956 school term, but later suspended pending appeal.

PAUL, District Judge.

OPINION BY THE COURT

This suit is an outgrowth of the decision of the Supreme Court of the United States in a group of cases in which challenge was made to the laws of those states which require that, in the operation of the public school system, separate schools be maintained for white and for Negro children. On May 17, 1954, the Supreme Court handed down its opinion under the style of Brown, et al. v. Board of Education of Topeka, et al. (reported in 347 U. S. 483) in which it held that state laws which require the segregation of white and Negro children in the public schools of the state solely on the basis of race were in violation of the Constitution of the United States, in that they denied to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment. Included in the group of cases covered by the opinion in Brown v. Board of Education of Topeka was one arising in Virginia under the style of Davis, et al. v. County School Board of Prince Edward County.

Following the rendition of the opinion above mentioned the Court retained the cases on its docket for further consideration of the terms of such decrees as would be appropriate to carrying out the holdings of the Court. After full consideration, which included the hearing of argument of all parties concerned, the Supreme Court on May 31, 1955, handed down its further opinion in these cases. In this opinion the Court recognized that the variation in local conditions involved differences in the problems arising in applying the principles enunciated by it and that it would be impracticable to fix a definite date on which segregation in all schools affected by its decision should cease. It made no attempt to fix such a date. However it did state that, after giving due consideration to the local conditions involved, "the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling." The defendants in the instant case were not parties to the litigation above referred to but the principles settled by that case are, of course, of universal application.

In the instant case the plaintiffs are some forty three children of the Negro race who sue by their parents or guardians as next friend and with whom these parents or guardians have joined as plaintiffs in their individual capacities. The complaint sets out that the suit is brought by the plaintiffs in their own behalf and on behalf of all other Negro children attending the public schools in Charlottesville. The defendants are the School Board of the City of Charlottesville and Fondall R. Ellis, Superintendent of Schools of that city.

[*Jurisdiction*]

Jurisdiction of this court is invoked under the Fourteenth Amendment to the Constitution, the Act of Congress of May 31, 1870 (16 Stat. 144; 42 U. S. C. 1981) and under Title 28 U. S. C. Sect. 1343. Without going into a discussion of the several constitutional and statutory provisions under which jurisdiction is alleged and without excluding the applicability of any of them, it is sufficient to say that the provisions of Title 28, Sect. 1343, plainly support jurisdiction in this court. The decision of the Supreme

Court in Brown v. Board of Education of Topeka, *supra*, established the right of Negro children not to be discriminated against on account of their race in admission to the public schools, and the purpose of this action, as shown by the complaint, is to redress the deprivation of that right. See 28 U. S. C. 1343 (3). The prayer of the complaint in brief substance is that the defendants and their successors in office be enjoined from enforcing the practice which has heretofore compelled that Negro children and white children be educated in separate schools.

The case came on to be heard on the complaint and the answer thereto, and on the testimony in open court from several witnesses offered by each side. But neither the pleadings nor the testimony of the witnesses present any substantial issues of fact in the case. The answer of defendants admits that the policy and the law of the State of Virginia require the maintenance of separate schools for white and Negro children and that they, the defendants, are following that policy in the operation of the public schools in Charlottesville. Defendants admit that they have taken no steps whatever toward the abandonment or modification of this policy. Such matters of defense as are presented in the answer involve legal questions. To these the court has given full consideration and has found none of them to offer a bar to the relief sought by the plaintiffs.

The defendants first assert that the laws of Virginia which require segregation in the public schools are not repugnant to the Constitution of the United States but are within the police power of the state. This is merely a reassertion of the contention which the Supreme Court struck down in the case of Brown v. Board of Education. That the defendants recognize this is indicated by the fact that they do not press the subject in argument.

[*Motion to Dismiss*]

The answer embodies a motion to dismiss the action on several stated grounds. The first of these is a brief allegation that the court is without jurisdiction and that the proceeding involves no controversy upon which relief should be granted. This point was not argued and in my opinion, as previously indicated herein, is without merit.

It is further moved on behalf of the defendant, School Board of the City of Charlottesville, that the action be dismissed as to it on the ground that the School Board is an agency of the State of Virginia and the state has not given its consent to be sued in this action. The Code of Virginia, Sect. 22-94, provides:

> "The school trustees of each city shall be a body corporate under the name and style of 'The School Board of the City of _____', by which name it may sue and be sued, contract and be contracted with, and purchase, take, hold, lease, and convey school property, both real and personal. ***"

Counsel for defendants urge that this statute granting permission to sue a School Board is intended to apply only to actions in the courts of the state. However the statute itself contains no such limitation. Its terms are comprehensive in that it makes a School Board suable without limitation as to the forum in which or the persons by which it may be sued. Nor does there appear to be any other statutory provisions or any decision of the courts of the state which impose on Sect. 22-94 the limitations now suggested. In support of their position defendants rely upon certain expressions in the opinion in the case of O'Neill v. Early, 208 Fed. (2d) 286, which arose in this Circuit and in which the opinion was written by Parker, Chief Judge. This was a case in which a public school teacher sued a superintendent of schools and a School Board for damages for breach of contract for failure to re-employ the plaintiff as a teacher. In affirming dismissal of the action by the District Court the Circuit Court did so on the ground that no jurisdiction existed in the Federal Court, in that the purpose of the action was to establish liability against the state payable out of public funds, and was plainly a suit against the state. In the course of the opinion this language is used, and is apparently that on which defendants rely:

> "The fact that the state has authorized the defendant school board to sue and be sued is immaterial, since it has not consented to suit in the federal court. (Citing cases) Even if it had consented to be sued in the federal court, jurisdiction is lacking since no federal question is involved and there is no diversity of citizenship in a suit which,

> although nominally against state officers, is in reality a suit against a state." (Citing cases)

Examination of the opinion from which the above quotation is taken seems to make it clear that because the remedy sought was a money judgment, which would have had to be paid from state funds, the Court considered the action to be one against the state. But the case in all its aspects is so far different from that before this court as to give it no applicability here. It is certain that the court did not mean to say that a state school board could not be sued in a federal court under any circumstances. In fact the same court with the same judges sitting and in an opinion also written by Parker, Chief Judge, upheld a suit against a school board where the plaintiff charged a violation of his constitutional rights. Alston v. School Board of City of Norfolk, 112 Fed. (2d) 992. Also in Corbin v. School Board of Pulaski County, 177 Fed. (2d) 924, and in Carter v. School Board of Arlington County, 182 Fed. (2d) 531, this same Circuit Court entertains suits against local school boards where violation of constitutional rights were charged.

[*Suit Against State*]

It is true that it does not appear that there was raised in any of these cases the point now urged upon this court, namely, that the suit is one against the state and that therefore the court is without jurisdiction. Neither does it appear that this defense was offered in any of the four cases decided by the Supreme Court under the reported title of Brown v. Board of Education, *supra*, including the case of Davis v. School Board of Prince Edward County. Considering the strenuous nature of the defenses offered in these cases it seems strange that this defense, which if valid would have been a complete defense, was overlooked. However this may be it seems clear that the contention made is without merit. It has long been settled that suits against state officers to restrain the enforcement of state laws which contravene the Federal Constitution are not suits against the state. See Dobie on Federal Procedure, Sect. 133, where in treatment of this subject it is said:

> "Such suits are treated as suits against the officers, not against the state; so they do not come within the prohibition of the Eleventh Amendment. This principle, applied by the Supreme Court in a long series of decisions, is now well established." (Citing Numerous Cases)

And, of course, where the subject matter of a suit is the protection of rights secured by the Constitution of the United States the federal courts have jurisdiction. In Sterling v. Constantin, 287 U. S. 378, suit was brought against several officials of the State of Texas including the governor of the state. The Supreme Court held that even the governor of a state was subject to private persons when by his acts under color of state authority he invades rights secured to them by the Federal Constitution, and that the suit was not one against the state; the Court, speaking through Chief Justice Hughes, saying (p. 393):

> "The District Court had jurisdiction. The suit is not against the state. The applicable principle is that where state officials, purporting to act under state authority, invade rights secured by the Federal constitution, they are subject to the process of the federal courts in order that the persons injured may have appropriate relief." citing Ex parte Young, 209 U. S. 123, 155, 156, and other cases.

In Looney v. Crane Co., 245 U. S. 178, which was a suit against the Secretary of State and the Attorney General of the State of Texas to enjoin the enforcement of a taxing statute alleged to be in violation of the Constitution of the United States, the Supreme Court closes its opinion (by Chief Justice White) with this paragraph (p. 191).

> "There is a contention to which we have hitherto postponed referring, that the court below was without jurisdiction because the suit against the state officers to enjoin them from enforcing the statutes in the discharge of duties resting upon them was in substance and effect a suit against the State within the meaning of the Eleventh Amendment. But the unsoundness of the contention has been so completely established that we need only refer to the leading authorities. Ex parte Young, 209 U. S. 123; Western Union Telegraph Co. v. Andrews, 216 U. S. 165; Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278"

The answer also includes a motion to dismiss the action as to Fondall R. Ellis, Superintendent of Schools of the City of Charlottesville, who is a named defendant. This motion also must be denied. The court takes notice of the fact that the Division Superintendent of Schools, whether in a city or county, exercises a greater influence over the operation of the schools than anyone else, including the School Board. The powers and duties of the Division Superintendent, which are fixed by the State Board of Education, are broad and extend to almost every detail in the management of the schools. To dismiss this official as a defendant might well nullify, or certainly lessen, the effectiveness of any decree that is entered here by making it non-applicable to the person having a large share in the responsibility for carrying it out.

Finally the defendants have moved that the action be dismissed on the ground that plaintiffs have not made a case appropriate to the relief sought, in that no evidence has been introduced showing that the school authorities of Charlottesville have ever denied the application of any Negro child for admission to any school in the city or that such an application has been made by any Negro. This motion rests on the tenuous support of the failure of any individual Negro child to file a formal application for admission to a school heretofore reserved for white children. Under the pleadings and the evidence in the case it is plain that the motion to dismiss on this ground is without merit and must be denied.

[*Preliminary Action by Plaintiffs*]

The evidence shows that in October, 1955, the plaintiffs in this case, through their attorneys, addressed a communication to the School Board of Charlottesville and to Mr. Ellis, the Superintendent of Schools, in which they referred to the ruling of the Supreme Court in its opinions of May 17, 1954, and May 31, 1955, and then said:

> "We therefore call upon you to take immediate steps to reorganize the public schools under your jurisdiction so that children may attend them without regard to their race or color.* * * * As we interpret the (Supreme Court) decision, you are duty bound to take immediate concrete steps leading to early elimination of segregation in the public schools. * * * * * We further request that you will give us an early reply setting forth your initial plans for desegregation."

Several weeks later the School Board made its reply in a communication which, while giving no direct answer to plaintiff's requests, made it clear that it intended to pursue the policy of segregation for the school session of 1955-56; and as to the future it gave no assurance whatever. In fact the School Board's reply, while plainly evasive, nevertheless gave the distinct impression that it was making no plans to discard the policy of segregation at any time. This is confirmed by the admissions made at the hearing of the case that no steps whatever have been taken to this time to comply with the ruling of the Supreme Court. The prayer of the complaint is in substance that the defendants be enjoined from continuing to maintain segregated schools. The defendants have refused to agree to abandon the practice of segregation and have made it plain that they intend, if possible, to continue it. Under this state of facts the plaintiffs are undoubtedly entitled to maintain this action and to have the relief prayed for.

[*Effective Time of Decree*]

It only remains to be determined as to the time when an injunction restraining defendants from maintaining segregated schools shall become effective. The original decision of the Supreme Court was over two years ago. Its supplementary opinion directing that a prompt and reasonable start be made toward desegregation was handed down fourteen months ago. Defendants admit that they have taken no steps toward compliance with the ruling of the Supreme Court. They have not requested that the effective date of any action taken by this court be deferred to some future time or some future school year. They have not asked for any extension of time within which to embark on a program of desegregation. On the contrary the defense has been one of seeking to avoid any integration of the schools in either the near or distant future. They have given no evidence of any willingness to comply with the ruling of the Supreme Court at any time. In view of all these circumstances it is not seen where any good can be accomplished by deferring the effective date of the court's decree beyond the beginning of the

school session opening this Autumn. Even though the time be limited it is not impossible that, at the school session opening in September of this year, a reasonable start be made toward complying with the decision of the Supreme Court.

ORDER

This action having come on to be heard on July 12, 1956, upon the complaint, the answer, and evidence offered by the plaintiffs and the defendants, and the arguments of counsel.

Upon consideration whereof, the court being of opinion that the plaintiffs are entitled to the relief sought in their complaint, and having set forth the reasons for its conclusions in a written opinion this day filed and made a part of the record,

It is accordingly ADJUDGED, ORDERED and DECREED

1. That the defendants, and each of them, their successors in office, and their agents and employees, be, and they hereby are, restrained and enjoined from any and all action that regulates or affects, on the basis of race or color, the admission, enrollment or education of the infant plaintiffs, or any other Negro child similary situated, to and in any public school operated by the defendants.

2. That this injunction become effective at the commencement of the school term commencing in September, 1956.

3. That the plaintiffs recover from defendants their costs in this action.

And the plaintiffs having moved the court that the defendants be required to pay the attorneys' fees of counsel for the plaintiffs in this action.

Now, therefore, upon consideration of said motion, the same is denied, to which action of the court counsel for the plaintiffs except.

It is further ORDERED

that this action remain upon the docket of the court and that the court retain jurisdiction of the same for such future action, if any, as may be necessary therein.

ORDER SUSPENDING INJUNCTION PENDING APPEAL.

This cause came on further to be heard on this *27th* day of August, 1956, upon defendants' motion praying for a suspension and supersedeas of the injunction issued herein on the *6th* day of August, 1956, pending the appeal which defendants desire to take from the decree; and,

It appearing to the Court that the defendants have stated good cause why the injunction should not be enforced pending appeal, it is ADJUDGED, ORDERED AND DECREED by the Court that the decree be suspended and that the injunction be suspended and superseded pending appeal.

Dated: Aug. 27, 1956

EDUCATION

Public Schools—Virginia

Clarissa S. THOMPSON et al. v. COUNTY SCHOOL BOARD OF ARLINGTON COUNTY et al.

United States District Court, Eastern District, Virginia, July 31, 1956, Civ. No. 1341.

SUMMARY: Negro school children in Arlington County, Virginia, brought a class action in federal district court against school officials of that county seeking to require their admission to public schools without regard to race or color. At a hearing on motions for summary judgment the court found that available state administrative remedies of the plaintiffs had been effectively exhausted and granted an injunction to the plaintiffs. The injunction provides for the admission of elementary school children to public schools without regard to race be-

ginning on January 31, 1957, and to junior and senior high schools in September, 1957. The court also retained jurisdiction of the case to supervise the enforcement of the injunction.

BRYAN, District Judge.

MEMORANDUM BY THE COURT

It must be remembered that the decisions of the Supreme Court of the United States in Brown v. Board of Education, 1954 and 1955, 347 U.S. 483 and 349 U.S. 294, do not compel the mixing of the different races in the public schools. No general reshuffling of the pupils in any school system has been commanded. The order of that court is simply that no child shall be denied admission to a school on the basis of race or color. Indeed, just so a child is not through any form of compulsion or pressure required to stay in a certain school, or denied transfer to another school, because of his race or color, the school heads may allow the pupil, whether white or Negro, to go to the same school as he would have attended in the absence of the ruling of the Supreme Court. Consequently, compliance with that ruling may well not necessitate such extensive changes in the school system as some anticipate.

ORDER GRANTING INJUNCTION

This cause came on to be heard on the 30th day of July, 1956 upon the complaint, upon the motion of the defendants to dismiss the complaint and the affidavits in support thereof, upon the motions of the plaintiffs to drop certain persons and add others as parties plaintiff, upon the stipulation of the parties that the action not be heard before July 23, 1956, and upon the documents offered in evidence at said hearing by agreement, and was argued by counsel.

Upon consideration whereof, after granting the said motions for the dropping and adding of parties, the court finds, concludes, and orders as follows:

1. The court treats said motion to dismiss as a motion for summary judgment and is of the opinion thereon as follows:

(a) That the defendant, County School Board of Arlington County, is suable in this court, because if acting as charged in the complaint, it is not acting as an agency of the State of Virginia;

(b) That the defendant, T. Edward Rutter, Division Superintendent of Schools of the County of Arlington, is suable in this action for the same reason as the said board if suable;

(c) That the complaint stated a claim against each of said defendants upon which, if proved, relief can be granted;

(d) That, as appears from the said documentary evidence, the plaintiffs before instituting this suit had exhausted all administrative remedies then and now available to them, including the administrative steps set forth in section 26-57 Code of Virginia 1950, in that, they have since July 28, 1955, in effect maintained a continuing request upon the defendants, the County School Board and the Division Superintendent of Schools, for admission of Negro children to the public schools of Arlington County on a nonracial basis, and said request has been denied, or no action taken thereon, the equivalent of a denial thereof;

(e) That this suit is not otherwise premature; and

(f) That the granting of the relief prayed in the complaint would not constitute the regulation and supervision by this court of the public schools of Arlington County:

Therefore, it is ADJUDGED, ORDERED and DECREED that said motion to dismiss the complaint, including summary judgment for the defendants, be, and it is hereby, denied.

2. The court proceeding to inquire if final judgment may now be entered in the action, it appears to the court from an examination of the pleadings, the said affidavits, and the said documentary evidence, as well as from the interrogation of counsel, that there is no genuine issue as to any material fact in this case, and that on the admissions of record and the uncontrovertible allegations of the complaint, summary judgment should be granted the plaintiffs:

Therefore, it is further ADJUDGED, ORDERED, and DECREED that effective at the time and subject to the conditions hereinafter stated, the defendants, their successors in office, agents, representatives, servants, and employees be, and each of them is hereby, restrained and enjoined from refusing on account of race or

color to admit to, or enroll or educate in, any school under their operation, control, direction, or supervision any child otherwise qualified for admission to, and enrollment and education in, such school.

3. Considering the total number of children attending the public schools of Arlington County, Virginia, and the number of whites and Negroes, respectively, in the elementary schools, junior high schools, and senior high schools, the relatively small territorial size of the County, its compactness and urban character, and the requisite notice to the school officials, as well as the period most convenient to the children and school officials, of and for making the transition from a racial to a nonracial school basis, and weighing the public considerations, including the time needed by the defendants to conform to any procedure for such transition as may be prescribed by the General Assembly of Virginia at its extra session called by the Governor for August 27, 1956, and weighing also the personal interests of the plaintiffs, the court is of the opinion that the said injunction hereinbefore granted should be, and it is hereby made, effective in respect to elementary schools at the beginning of the second semester of the 1956-1957 session, to-wit, January 31, 1957, and in respect to junior and senior high schools at the commencement of the regular session for 1957-1958 in September 1957.

4. The foregoing injunction shall not be construed as nullifying any State or local rules, now in force or hereafter promulgated, for the assignment of children to classes, courses of study, or schools, so long as such rules or assignments are not based upon race or color; nor, in the event of a complaint hereafter made by a child as to any such rule or assignment, shall said injunction be construed as relieving such child of the duty of first fully pursuing any administrative remedy now or hereafter provided by the defendants or by the Commonwealth of Virginia for the hearing and decision of such complaint, before applying to this court for a decision on whether any such rule or assignment violates said injunction.

And jurisdiction of this cause is retained with the power to enlarge, reduce, or otherwise modify the provisions of said injunction or of this decree, and this cause is continued generally.

EDUCATION

Public Schools—West Virginia

L. Eugene ANDERSON, an infant, by his next friend, Eugene E. Anderson, et al. v. The BOARD OF EDUCATION OF THE COUNTY OF MERCER, a corporation, et al.

United States District Court, Southern District, West Virginia, December 29, 1955, Civ. No. 437.

SUMMARY: Negro school children in Mercer County, West Virginia, brought a class action in federal district court seeking to require their admission to public schools in that county without regard to race or color. Prior to a final hearing on the suit, an agreement was reached between the plaintiffs and county school authorities which would, in effect, operate to desegregate the schools as of September, 1956. Accordingly, a consent order was issued by the court, reciting the invalidity of West Virginia statutory and constitutional provisions requiring racial segregation in the schools and approving the integration plan. The court further retained jurisdiction of the case to supervise the implementation of the plan.

MOORE, District Judge.

ORDER

This day came plaintiffs by T. G. Nutter, their attorney, and the defendants by Joseph M. Sanders, their attorney, and it appearing to the court, from representations of said attorneys, that the parties hereto have, by consent, adjusted their differences, as appearing from the Complaint and Answer, and have, through their said attorneys, consented to this order, and it further appearing to the court from a consideration of the Complaint and Answer filed herein, and the representations of the attorneys for said parties, that this consent order is proper in all respects and adequately protects the interests of plaintiffs, and those similarly situated.

Therefore, it is adjudged, ordered and decreed, as follows:

1. Plaintiffs are Negroes, citizens of the United States, and State of West Virginia. They are

residents of Mercer County, West Virginia. They all satisfy all requirements for admission to the schools of Mercer County. Eugene E. Anderson, Ellis Meron Thomas, Lester King and McKinley McDaniel are the parents, or legal guardians, of the infant plaintiffs.

2. W. R. Cook is County Superintendent of the elementary and secondary public schools of Mercer County, West Virginia. Defendants, Jack McClaugherty, Ralph Edward Barnett, D. J. Sexton, L. F. Snead and C. R. Justice, constitute the Board of Education of Mercer County, West Virginia, which Board has supervision and control of the elementary and secondary public schools of Mercer County, West Virginia. Up to the date of the entry of this order, the elementary and secondary public schools of Mercer County, West Virginia, have always been operated and maintained upon a segregated basis, to-wit, separate schools have been maintained exclusively for white students, and separate schools have been maintained exclusively for Negro students, and Negro children have never been permitted to attend said schools operated and maintained exclusively for white children, and white children have never been permitted to attend said schools operated and maintained exclusively for Negro children.

3. On or about July 7, 1955, plaintiffs petitioned the Board of Education of The County of Mercer to abolish segregation in the elementary and secondary public schools of Mercer County, West Virginia, but to this date segregation has not been abolished in said schools, but to the contrary, said schools have at all times been operated and maintained upon a strictly segregated basis.

4. This court has jurisdiction of the subject matter alleged in the Complaint filed herein, and of all parties here to, and the Complaint states a cause of action against said defendants under Section 1 of the Fourteenth Amendment to the United States Constitution; United States Code Annotated, Title 28, Sections 1331, 1343 and 2281; United States Code Annotated, Title 42, Section 1981 and 1983; and under Rule 23 (a) of the Federal Rules of Civil Procedure.

5. Article XII, Section 8, of the Constitution of the State of West Virginia, and Section 1775 (18-5-14) Michie's West Virginia Code of 1955, require the segregation of white and Negro students in all the public schools of the State of West Virginia, but said constitutional and statutory provisions are, and are conceded by defendants to be, null, void and unenforceable, because they are in conflict with provisions of the Constitution of the United States.

6. Beginning on the 4th day of September, 1956, that being the first day of the school year 1956-7, all elementary and secondary public schools of Mercer County, West Virginia, shall be, and are, hereby desegregated at all levels, and thereafter shall be maintained and operated upon a wholly integrated basis, and no child or student of school age, resident in Mercer County, West Virginia, shall be refused admission by defendants, or their agents, servants, employees, or representatives, to any elementary or secondary public school of Mercer County, West Virginia, on account, or by reason, of race or color, or by reason of any constitutional provision, statute, law, custom or practice, requiring or pemitting segregation of the races in the public schools of the State of West Virginia.

[*1956 School Year*]

7. On September 4, 1956, that being the first day of the school year 1956-7, and thereafter, all of the defendants, and all those charged with the admission of students to the elementary and secondary public schools of Mercer County, West Virginia, are required to receive the applications of plaintiffs and other Negroes similarly situated, for admission to said elementary and secondary public schools, and shall process and pass on the qualifications of said applicants, regardless of their race or color, and at the beginning of said 1956-7 school term, defendants shall have a program ready to proceed on an entirely free basis, so that all Negro and white students will be provided school facilities without racial discrimination.

8. This order shall be binding and enforceable against all of the defendants to this action, and their successors in office, and all present and future employees, agents and representatives of the Board of Education of the County of Mercer.

9. The court will retain jurisdiction of this cause during the period of transition from a segregated school system to a desegregated school system, as above required, for such action as may become necessary.

EDUCATION
Colleges and Universities—Alabama

Autherine J. LUCY et al. v. William F. ADAMS et al.

United States District Court, Northern District, Alabama, August 29, 1956, Civ. No. 652.

SUMMARY: The defendants, officials of the University of Alabama, had been ordered by the United States District Court not to refuse to admit the plaintiffs, Negro women, to the university solely on the basis of race or color. 134 F. Supp. 235, 1 Race Rel. L. Rep. 85 (1955). That order had been affirmed by the United States Court of Appeals for the Fifth Circuit. 228 F.2d 619, 1 Race Rel. L. Rep. 88 (1955); *cert. denied*, 351 U.S. 931, 76 L.Ed. 790, 1 Race Rel. L. Rep. 643 (1956). Because of disturbances which accompanied the admission of one of the plaintiffs, she was temporarily excluded from the university. She then moved that the defendants be held in contempt of court. The District Court refused to grant a contempt citation, holding that the action taken to exclude her was in good faith to protect her, but ordered her readmission to the university. 1 Race Rel L. Rep. 323 (1956). Prior to her readmission the university trustees took action to expel her permanently. I Race Rel. L. Rep. 456 (1956). The plaintiff later moved the court to amend its previous order so as to require her admission to the university beginning with the September 1956 term. The court declined to so amend the previous order, stating that the Board of Trustees had authority to expel the plaintiff for just cause and that that authority should not be interfered with by the court except upon appropriate proceedings and after a clear showing of deprivation of constitutional rights by the Board.

GROOMS, District Judge

The proceedings heard on February 29, 1956, were for contempt. The Court, after hearing the evidence, held that the prior suspension or exclusion of the plaintiff under the facts did not constitute contempt; however, the Court ordered the suspension terminated on March 5, at 9:00 a. m. Following the hearing on February 29, the Trustees of the University permanently expelled the plaintiff. This expulsion purported to be based upon conduct, acts, and statements that occurred subsequent to the suspension and prior to the trial. Such conduct, acts, and statements were not made an issue upon the trial on February 29, if in fact they were germane to the issues there tried, and, accordingly, were not considered by the Court, and did not enter into the Court's judgment. The Trustees have an unquestioned right to expel a student for just cause. The trustees also have the power to delegate the right of expulsion to its officers or the officers of the University.

Plaintiff's motion seeks to have the Court amend its order of February 29 to provide that the plaintiff be readmitted to the University for the September 1956 term. The Court is of the opinion that it should not interfere with the administrative acts of the Trustees or the officers of the University except upon appropriate proceedings, and after a clear showing that such acts contravene the constitutional rights of the plaintiff as defined by the Supreme Court. I am, therefore, of the opinion that in the present posture of this case that plaintiff's motion to amend the order of February 29, 1956, should be overruled. This ruling, however, is without prejudice to plaintiff as to any future proceedings that may appropriately challenge the acts of the Trustees in permanently expelling her from the University.

This ruling renders unnecessary a ruling on defendants' motion to dismiss.

EDUCATION
Teachers—Arizona

Horace J. CHESLEY et al. v. Doris J. JONES

Supreme Court of Arizona, June 26, 1956, No. 6193, _____ P.2d _____.

SUMMARY: The plaintiff, a Negro teacher in Arizona, was notified by the defendant superintendent of schools in the district in which she taught that her probationary contract was not renewed for the school year 1955-56. The reason stated for non-renewal of the contract was that she was the third member of a family employed as teachers at a five-teacher school. The plantiff sought a writ of mandamus in an Arizona state court to compel her reinstatement, alleging that the failure to renew her contract was based on discrimination because of race. The trial court granted the writ. On appeal the Supreme Court of Arizona dismissed the writ, holding that, unless it clearly appears that there has been an abuse of discretion, the courts may not review the action of school authorities in failing to renew the contracts of probationary teachers.

PHELPS, Justice.

This is an appeal from a judgment of the superior court of Pinal County ordering the issuance of a peremptory writ of mandamus, directed to defendants (members of the school board) in that action, commanding them to execute a new contract of employment with the plaintiff.

Plaintiff, Doris Jones, had been employed by defendants to teach at Carver School, Eloy, Arizona. She was certified as a probationary teacher under the provisions of section 54-1009 to 54-1018, A.C.A. 1939 1952 Cum. Supp., and had nearly completed her third consecutive year in this position. Had her contract been renewed for the school year 1955-1956, at the end of the year she would have been entitled certification as a "continuing teacher", acquiring this status under Arizona's "Teacher Tenure Law."

On March 14, 1955, plaintiff received a written notice signed by H. J. Chesley, Superintendent of elementary schools, Eloy, Arizona, which is reproduced as follows:

> "This is to notify you that your teaching contract will not be renewed for the 1955-56 school term. The board feels that it is unwise to employ three teachers from the same family on continuing contracts in a five-teacher school.
>
> "They feel that this is especially true in view of the past criticism from the patrons of the school.
>
> "This action in no way reflects on your teaching ability or character and both the board and superintendent will do everything possible to aid you in securing another teaching position."

Plaintiff, with the aid of others, attempted to negotiate with the defendants for a new contract but were not successful. It was shown at the trial that plaintiff was a competent teacher holding an A.B. degree and having taken additional advanced work. Her moral character was attested to as excellent. There was a vacancy for a teacher both at the Carver School and another school within the district for white children at which all teachers employed were white. Three witnesses testified that defendants Chesley and Beauchamp had stated that no more colored teachers would go on tenure. These defendants denied they had made such a statement. Defendant Shay testified that he would not consider hiring a Negro to teach in a white school.

[*Marries Into Family*]

During the first two years plaintiff taught she was unmarried. During the third, plaintiff was married to the son of Mr. and Mrs. P. A. Jones, both of whom are teaching at Carver School, and had signed her teaching contract with her married name, Doris Reager Jones. The following March she was notified that her teaching contract would not be renewed.

Subsequently plaintiff filed a petition in the superior court of Pinal County for a writ of mandamus directing the school board to reinstate her as a teacher and to issue to her a new contract for the year 1955-1956. An alternative writ was issued July 22, 1955, and upon a hear-

ing of the evidence, a peremptory writ of mandamus was issued August 22, 1955, commanding the school board to execute an employment contract to plaintiff for the school year 1955-1956.

Appellants first assign as error that the court below erred in considering the construction of sections 54-1009 through 54-1018, A.C.A. 1939, 1952 Cum. Supp., popularly known as the "Teacher Tenure Act", upon the ground that this question had not been raised by the pleadings of appellants in this action.

[*Allegation of Racial Discrimination*]

The appellants here were defendants below, and their assignment of error based upon the court's consideration of certain matter upon the ground that they were not raised by their own pleadings below is without merit. The issue was raised by plaintiff in Paragraph III of her complaint in which it is alleged that:

> "• • • the School Board did not wish to permit any more members of the Negro or African Race to attain teaching tenure under the laws and statutes of the State of Arizona."

This paragraph is incorporated in both plaintiff's first and second causes of action and is sufficient to justify our consideration of the statutes relating thereto.

The second assignment of error does not conform with Rule 5 (c) 1, Rules of the Supreme Court, 1956, and will not be considered. In any event its consideration could not change the result reached herein.

The third assignment of error states that the trial court erred

> "In holding that under our Teacher Tenure Act the decision of a Board of Trustees to dismiss a probationary teacher is subject to review by the courts."

This matter was squarely met in the case of Tempe Union High School Dist. v. Hopkins, 76 Ariz. 228, 262 P.2d 387. In that case it was pointed out that in the passage of sections 54-1011 and 54-1012, 1952 Cum. Supp., A.C.A. 1939:

> " • • • • that the legislative intent was to provide for a hearing and appeal to the courts upon dismissal of a continuing teacher and to deny such right to a probationary teacher. • • •."

The court there held that sections 54-1009 to 54-1018 inclusive, supra, and statutes of like character

> "• • • creating a special procedure for the protection of personal rights must be strictly followed and the failure of either party to comply therewith loses whatever rights the law was intended to protect."
>
> Citing Fresno City High School District v. D. Caristo, 33 Cal. App.2d 666, 92 P.2d 668.

We then stated that failure to state the reason or reasons in said notice for terminating a probationary teacher's contract as provided by the statute was in law no notice at all and that such notice was therefore void; that under the law, her contract was automatically renewed by operation of law on March 15, 1952 (this being the date on or before which notice of termination is required by the statute to be given); that there remained only the ministerial act on the part of the board of reducing her contract to writing, hence mandamus would lie and was the proper remedy.

[*Different Circumstances*]

The circumstances in the instant case are entirely different. The board expressly stated that it would not renew plaintiff's contract for the ensuing year for the reason that it felt it unwise to employ three teachers from the same family on continuing contracts in a five-teacher school, especially in view of past criticism from the patrons of the school.

There is nothing in the sections 54-1009 to 54-1018, inclusive supra, giving the court the power to review the reason given by the board for terminating the contract of a probationary teacher. Therefore unless the reason given is so unreasonable, arbitrary and capricious and about which reasonable men could not differ, the courts are without jurisdiction to review the action of the board in mandamus proceedings. In other words, courts may not invade the discretionary powers of an administrative body unless it clearly appears that in its exercise it has been guilty of an abuse thereof. Ackerman v. Houston, 45 Ariz. 293, 43 P.2d 194; Peters v. Frye, 71 Ariz. 30, 223 P.2d 176; Collins v. Krucker, 56 Ariz. 6, 104 P.2d 176, 179; Brown v. City of Phoenix, 77 Ariz. 368, 272 P.2d 358. We cannot say that

the reason given for terminating plaintiff's contract is not a valid reason or that reasonable men might not disagree as to its validity or invalidity. It follows that mandamus will not lie in this case.

Judgment reversed with instructions to quash the peremptory writ of mandamus and to dismiss plaintiff's complaint.

LaPRADE, C. J., UDALL, WINDES and STRUCKMEYER, Jr., CONCUR.

GOVERNMENTAL FACILITIES
Swimming Pools—California

Susan McCLAIN, by her guardian ad litem, Mildred McClain Johnson, v. CITY OF SOUTH PASADENA.

Superior Court In and For the County of Los Angeles, California, May 31, 1956, No. Pasa. C-5399.

SUMMARY: The plaintiff brought an action in a California state court against the city of South Pasadena, alleging that she was illegally denied admission to a city swimming pool solely on the basis of her race or color. The court found that, at the time in question, a valid rule of the city's department of recreation limited use of the swimming pool to city residents and that the plaintiff was not a city resident. The action was accordingly dismissed.

EVANS, J.

MEMORANDUM OPINION

In this case the defendants shall have judgment and the plaintiff take nothing by her complaint.

The Court finds that the plaintiff, together with Mr. Abbott and his children, were not refused permission to use the swimming pool in question by reason of the color of the plaintiff but instead refused admission to the pool by reason of the non-residence of the plaintiff, Mr. Abbott, and his children.

The Court further finds that the regulation permitting only residents of the City of South Pasadena to use the pool is a reasonable regulation and is within the power of the said City of South Pasadena, hence defendants shall prepare findings and judgment in accordance herewith.

Dated: May 14, 1956.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause was tried without a jury in Department Pasadena "B" of the above named Court on April 16 and 17, 1956, the Honorable Walter R. Evans, Judge presiding. Plaintiff was represented by her counsel, Hugh R. Manes and A. L. Wirin. Defendants were represented by their counsel, Braeme E. Gigas, City Attorney of the City of South Pasadena, and Dunlap, Holmes, Ross & Woodson and John W. Holmes. Evidence, oral and documentary, was received and the cause submitted for decision upon the filing of briefs by counsel. Having considered the evidence and law, and good cause appearing, the Court now makes the following

FINDINGS OF FACT

I

The facts alleged in paragraphs I to VIII, inclusive, of the Complaint are true.

II

Defendant Donald Skraba was, at all times mentioned in the Complaint, an employee of the defendant City of South Pasadena and was the Assistant Manager of the municipal plunge of said City and in said capacity assumed the duties and authority of the Manager of said plunge in the absence of said Manager.

III

Defendant Cathi McColgan (sued as Cathi McClogan) was, at all of said times, an employee of said City and acted as cashier at said plunge.

IV

The facts alleged in paragraphs XII, XIII and XIV of the Complaint are true.

V

It is true that defendants Cathi McColgan and Donald Skraba informed John H. Abbott that he and his party, including plaintiff, would not be

permitted to use the said plunge on the occasion referred to in paragraph XIII of the Complaint.

VI

The facts alleged in paragraph XXII of the Complaint are true.

VII

Except as expressly found to be true above, all allegations of the Complaint are untrue.

VIII

It is true that defendant Neil Cornell, in his capacity as Manager of said plunge, acted only under the direction and control of defendant Robert Seiler, Superintendent of the Department of Recreation of said City.

IX

It is true that defendant Donald Skraba, in his capacity as Assistant Manager of said plunge, acted only under the direction and control of said defendant Robert Seiler in his said official capacity.

X

It is true that defendant Cathi McColgan, in her capacity as an employee of said City, acted only under the direction and control of said Robert Seiler in his said official capacity.

XI

It is true that on the occasion referred to in paragraph XIII of the Complaint there was in existence a rule of the defendant City of South Pasadena and its Department of Recreation requiring persons who used said plunge to be residents of said City and that said rule was, on said occasion, known to the defendants Cathi McColgan and Donald Skraba.

XII

It is true that on said occasion the said plunge was the only such facility publicly owned and operated in and by said City; and that the said plunge was of such size and capacity, the said City was so populated, and the seasonal use of said plunge was of such extent and character that the said rule was reasonably justified to assure the orderly use of said plunge and its maximum usefulness.

XIII

It is true that on said occasion plaintiff was not a resident of the City of South Pasadena and that she was denied permission to use said plunge solely because of the said rule and not on account of her race or color.

XIV

The allegation of paragraphs XVII and XVIII of the Answer of All Defendants Except John Doe and Jane Doe are true.

From the foregoing facts the Court determines the following

CONCLUSIONS OF LAW

I

Plaintiff was lawfully denied permission to use the municipal plunge of the City of South Pasadena on the occasion alleged in the Complaint.

II

Plaintiff was not, on said occasion, denied any right or privilege, denied any immunity or deprived of due process of law or equal protection of the law by defendants or any of them.

III

Plaintiff is entitled to nothing herein and defendants are entitled to judgment for their costs.

IV

Judgment should be made and entered accordingly.

Dated this 31st day of May, 1956.

JUDGMENT

The above entitled cause having been tried by the above named Court in Department Pasadena "B," the Honorable Walter R. Evans, Judge presiding, on April 16 and 17, 1956; plaintiff being represented at the trial by her counsel, Hugh R. Manes and A. L. Wirin, and defendants by their counsel, Braeme E. Gigas, City Attorney of the City of South Pasadena, and Dunlap, Holmes, Ross & Woodson and John W. Holmes; and the evidence having been received, the cause argued on briefs of counsel and submitted, and the Court having made and filed its written Findings of Fact and Conclusions of Law and good cause appearing therefor:

IT IS ORDERED, ADJUDGED AND DECREED:

That plaintiff take nothing in this action; and

That defendants have judgment against plaintiff for their costs, which are hereby taxed at $125.10.

Dated this 31st day of May, 1956.

PUBLIC ACCOMMODATIONS
Restaurants—Canada

Morley McKAY v. J. F. KNUTLAND

County Court for the County of Kent, Ontario, Canada, May 23, 1956.

SUMMARY: The appellant was convicted in an Ontario magistrate court of a violation of the Ontario Fair Accommodation Practices Act of 1954. The violation alleged was a refusal of service in the appellant's restaurant to a Negro because of his race or color. The conviction was appealed to the county court on the grounds, among others, that the Act was unconstitutional and that the defendant had not, himself, refused the service. The court affirmed the conviction, holding the Fair Accommodation Practices Act to be valid and ruling against other contentions of the appellant.

LANG, J.

JUDGMENT.

First of all we shall deal with the charge:—That he (the accused man, Morley McKay), on the twelfth day of November, 1955, at the Town of Dresden, in the County of Kent, did unlawfully deny to Percy Bruce, a negro, because of the colour of the said Percy Bruce, services available in Kay's Cafe, a place to which the public is customarily admitted, contrary to the Fair Accommodation Practices Act, 1954."

Now I will proceed to discuss the evidence: On Saturday, November twelfth, 1955, Mr. Blum, who is Executive Secretary of the Joint Labor Committee on Human Rights and who lives in the City of Toronto, drove his car to Dresden. He left Toronto about 8:30 in the forenoon, accompanied by Percy Bruce and Jake Alleyne, both of whom are West Indians from the Island of Trinidad, in the West Indies, and both of whom are negroes. They are third-year students at the University of Toronto. He was also accompanied by Robert Van Alstyne, Miss Helen Steenson and Miss Ruth Lohr, who were white in colour. They reached London around noon the same day, had a light snack consisting of a sandwich and coffee, or something like that. They arrived in Dresden at approximately 2:15 in the afternoon. Miss Steenson went into Kay's Restaurant first. That is a restaurant to which the public is customarily admitted, and where meals, lunches, ice cream, coffee, and so on, are served. She sat in a booth facing the door, ordered a banana split and received service. About five minutes later Bruce and Alleyne came in and sat at the counter. Bruce asked the waitress for a strawberry milk-shake and Alleyne asked her for a vanilla milk-shake. The waitress, who is described as about twenty-six years of age, took down two milk-shake cans from the shelf and was about to prepare the milk shakes. Alleyne then asked her for pumpkin pie. At this time a young waitress, about fourteen years of age, went to the back of the restaurant, returned, exchanged glances with the older waitress and they both then went to the back. The older waitress did not return. Alleyne later asked for raisin pie or any other pie that was available but he did not receive any. Alleyne then asked the young waitress to remind the older one that they were waiting to be served.

Then an elderly man came in, white in colour, sat down, asked for cream pie and coffee, and was served. Then Alleyne went to the back of the restaurant and rapped on the serving counter, which is a hole where food is put through from the kitchen to the front part of the restaurant, and asked the accused man, Mr. McKay, if they were going to be served. McKay didn't answer. He repeated the question two or three times, in a voice loud enough to be heard.

Shortly after that an elderly woman came in. She also was white in colour. She sat down at a booth, asked for coffee and was served coffee.

Then the cook, or at least a person who was dressed in clothes similar to those a cook would be, came from the kitchen at the rear of the restaurant, went to the front, closed the Venetian Blind on the window, pulled down the blind on the door, locked the door and returned to the kitchen. Then Alleyne went to the kitchen door, —not the counter, but an opening that takes the place of a door, and saw Mr. McKay in the rear. He asked if they were going to be served and then asked if they weren't being served because of their colour. McKay did not answer. Alleyne returned and sat down at the counter, stayed for a few minutes longer and then he and Bruce left. Altogether they were there about

twenty-five minutes and were served nothing during that time.

As soon as they left, McKay, the cook and two others rushed up to the front door from the back and looked down the street. McKay said, "They are spotters. I didn't think they were, but now I know they were." Evidence shows that both Bruce and Alleyne were dressed respectably and acted properly. Miss Steenson came out later, and then, approximately twenty-five minutes after that, again, Van Alstyne, who was also a student at the University of Toronto, white in colour, went in and placed an order for apple pie and got it. The evidence shows that the pie was cold and had not recently been cooked. By the time he entered the Cafe the door was open and so were the blinds.

Conversation between McKay and Miss Steenson at the time McKay was looking out the door after Bruce and Alleyne had left, indicated there was trouble in Dresden with coloured folk; at least, so McKay said.

[*Denial of Service*]

Now, then, the charge is that Bruce was denied service. According to The New Oxford Dictionary one of the meanings of the word "deny" is "to refuse or withhold". On this evidence it is perfectly clear that on November Twelfth, 1955, Bruce was denied services available in Kay's Cafe, Dresden, "a place to which the Public is customarily admitted". It is not necessary that the waitresses, or McKay, say in so many words, "I refuse to serve you food". In this case milk-shakes and pie were ordered but never served,—in spite of repeated requests for same, of both the younger waitress, the cook, and McKay over a period of twenty-five minutes or so, which is more than a reasonable length of time. It seems to me this plainly is a case where actions speak just as loudly as words.

The evidence also shows that all the white people were served. All of those who were in the restaurant on this day, on this occasion were served; only the two negroes went un-served. They were from Trinidad,—undoubtedly not known to either McKay or the waitresses. Their conduct and dress were satisfactory, and the only possible reason that they were not served must have been because of their colour. Miss Steenson's evidence also bears this out.

This matter of pulling down the blinds and locking the door in the middle of a Saturday afternoon is clear indication that so far as these negroes were concerned the place was closed and they might as well depart.

[*Participation by Defendant*]

The next question to be decided is whether or not the accused, Morley McKay, denied the services. There is the evidence of a police constable that in November, 1954, he was talking to McKay, who told him that by March of 1955 he, McKay, would have been in the restaurant business for thirty-one years. There is a sign in the front of the restaurant which says: "Kay's Restaurant", and at the bottom the words, "M. McKay". There is the evidence of the Town Treasurer of the town of Dresden, and these are almost his exact words: "The accused has a restaurant on St. George Street in Dresden. He is a restaurant owner. The abstract of title shows he owns the lot on which the restaurant building stands, and is assessed as owner thereof." This evidence shows that he is the owner and proprietor of Kay's Restaurant. But that is not enough. An owner is not IPSO FACTO guilty of an offence under this Act unless it can be shown beyond reasonable doubt that he denied the services. The waitress with whom the orders were originally placed was apparently willing to serve Bruce and Alleyne; apparently she had no animosity towards them, because she started to prepare the order until she received a look from the younger waitress. They went to the kitchen. McKay was in the kitchen. They returned but no service was given.

Alleyne went back, first to the hole used as a counter, then later to the door and asked McKay if they were going to be served, and asked it more than once. A man, a cook, came from the back and closed the blinds and locked the front door. McKay apparently approved of this because he came to the door after they left and peeked out and there is no evidence that he reprimanded anyone for locking up in the early afternoon. He was the proprietor. All he had to do was to tell the waitress to serve Bruce and Alleyne. He refused or refrained from doing so. By his conduct, I find that he denied the services of his restaurant to Bruce and Alleyne.

The waitress involved, on the evidence, would appear to be guilty of the offence, too, but she is not charged here.

[*Conclusion of Court as to Facts*]

Now, I have come to this conclusion on the facts, without regard to the evidence of occurrences on previous occasions as related in the evidence of Blum, Armstrong, Atkinson and Maxwell. They gave evidence before the learned Magistrate over the objection of Counsel for the Accused, in order to show that the accused had a pattern, or system, or method in handling negro customers, that method being closing the blinds and locking the door. It was tendered to show that the action on November Twelfth of closing blinds and closing doors was not accidental or without intent. This is an exception to the rule, although evidence of similar acts may not be given to show a person is of a criminal character or propensity which would render him likely to commit the offence for which he is being tried. This evidence did show such a pattern or design, and for that purpose only I held it to be admissible. But, as I said before, I have entirely disregarded it in coming to the conclusion on the facts that the accused man, the Appellant here, is guilty of the offence as charged.

[*Constitutionality of Statute*]

In the Notice of Appeal the Appellant alleges that the Fair Accommodations Practices Act of Ontario, 1954, is ULTRA VIRES of the Ontario Legislature. Under Section 92 of the British North America Act the legislatures of the provinces have the right to legislate on certain matters, among them being property and civil rights within the province. Counsel for the Appellant contends that this is not legislation under the property and civil rights clause. Counsel for the Respondent contends that it is.

In order to determine the constitutional validity of an Act one has to look at the Act itself and scrutinize it to determine its true character; what is the real pith and substance of it, and whether or not it is a disguised attempt to legislate on subject matter beyond the jurisdiction of the legislative body.

This Statute has a preamble which purports to disclose the purpose of it, and the preamble is as follows:—"Whereas it is public policy in Ontario that places to which the public is customarily admitted be open to all without regard to race, creed, colour, nationality, ancestry or place of origin; Whereas it is desirable to enact a measure to promote observance of this principle; And Whereas to do so is in accord with the universal declaration of human rights as proclaimed by the United Nations" . . . And Section 2 of the Act carries out in enactment form the exact purpose enunciated in the preamble.

Seldom does one see a preamble such as this, setting forth the purpose of the Act. After perusing the whole Act I have concluded that the purpose or effect of the Act is set out correctly in the preamble, and that it is legislation to ensure that accommodation and service in places of business in Ontario shall be available to anyone, without regard to race, creed, colour, nationality, ancestry or place of origin. It is not intended to be a declaration of human rights or a statute of human liberties. It is limited to one phase of this only, namely: the right of all people in Ontario to service and accommodation in places of business in Ontario, which are customarily available therein.

I do not intend to review the cases quoted to me in the excellent briefs prepared for me by the parties. I want to thank Counsel for both parties for the great assistance they have given me, in the preparation of these briefs on the law. Particularly, I notice, has Mr. Donahue gone to considerable time and trouble in preparing his lengthy legal argument. In the time at my disposal last night I read through all the legal arguments, (perhaps some parts more hurriedly than others), and I also read the parts of Mr. Varcoe's able book on Civil Rights that I thought applicable to this case, and after considering the arguments in Mr. Varcoe's book, I have concluded that this IS "Legislation under the head of property and civil rights within the province".

[*Type of Legislation Authorized*]

Next, Counsel for the Appellant argues that this is really criminal legislation and as such is within the exclusive jurisdiction of The Parliament of Canada. The Parliament of Canada has not yet legislated on this matter either under the head of 'Criminal Law' or under its power to legislate "for the peace, order and good government of Canada". But if it be in reality criminal legislation it is ULTRA VIRES of the Ontario Legislature. The mere fact that the legislation creates a prohibition does not bring it within the category of criminal law.

Provincial legislatures have the right to impose

punishment by fine or imprisonment for breaches of laws which they have the right to enact. That is provided by the British North America Act, Section 92, sub-section 10. Counsel for the Appellant contends that this is an Act designed for "the promotion of public order, safety or morals" and as such creates a new kind of crime. If this is an Act designed for the promotion of public morals or the prevention of public wrongs it may be ULTRA VIRES of the Province of Ontario. It is not an Act having to do with gambling, Sunday observance (such as has been dealt with in certain cases quoted to me), nor do I think it is a case having to do with public morals, but rather an Act which creates a new civil right.

[*Similar Acts*]

In considering this Act I am reminded of another one in the Province of Ontario which in many respects is something similar to it, and that is The Ontario Labor Relations Act. That Act has clauses in it somewhat similar to this,—for example, the one which provides there shall be no discrimination by an employer against an employee by reason of his membership in a trade union. It provides a prohibition against an employee going on strike or an employer conducting a lock-out during the terms of a collective bargaining agreement. It is rather interesting, too, in this connection: that there is Dominion legislation under the Criminal Code dealing with violence and strikes and prohibiting anything beyond peaceful picketing during strikes, and defining what peaceful picketing is. So, then, as regards that Act we have two statutes running along together, one of them prohibiting violence and so on, during strikes, and the other setting forth legislation regarding civil rights. The Ontario Labor Relations Act is one which is constantly before the Courts in some form or other and I do not think the constitutional validity of it has yet been seriously questioned.

It may well be that Parliament, under the head of 'peace, order and good government' could pass valid legislation along the same lines as it has done in the case of The Canada Temperance Act, but it has not done so so far as the matter before us is concerned and, therefore, we are not at the present time concerned with any conflict which there might be in legislation. I cannot see that this Act comes within the domain of what may be considered 'criminal law' or 'public law'.

Lastly, Counsel for the Appellant submits that Section 2 of the Act legislates on the matter of religious freedom or the right of religious worship because of the inclusion of the word "creed" in Section 2. He quotes the cases of SAUMER vs. City of Quebec, 1953, 4 D.L.R., 64, and BIRKS vs. City of Montreal, 1955, 5 D.L.R., 22, to show that religious freedom is not a civil right and that such legislation is under the jurisdiction of Parliament. Even if these cases do hold that legislation respecting religious freedom is beyond the jurisdiction of the provincial legislature, I cannot see their relevancy here. Not by the widest stretch of one's imagination can I see where the legislation mentioned herein deals in any way with religious freedom. It neither enlarges, confirms or restricts religious liberty or the right of worship as one chooses. On all grounds, therefore, I find that The Fair Accommodation Practices Act of Ontario, 1954, is INTRA VIRES of the Ontario Legislature and I find the accused guilty of the offence as charged, and the Appeal will be dismissed.

[*Second Offense*]

The second offence is exactly the same except that the accused man, Morley McKay, is charged "That on the same day, the twelfth day of November, 1955, he did deny to Jake Alleyne, a negro, because of the colour of the said Jake Alleyne, services available in Kay's Cafe, a place to which the public is customarily admitted, contrary to The Fair Accommodation Practices Act, 1954."

Counsel agreed that the evidence in the Bruce case should apply in this case and I so directed. Therefore, for the same reasons, both as to the facts and as to the law, I find the accused guilty of this offence and his Appeal will be dismissed.

In each case I will endorse the Record as of today's date: "Appeal is dismissed. Accused is found guilty of the offence as charged." And the penalty will be Twenty-five ($25.00) dollars and costs of One hundred and fifty-five dollars and eighty cents ($155.80) in the Magistrate's Court, and costs of this Court of Seventy ($70.-00) dollars, the money paid into Court as deposit to be applied towards the payment of the costs. Balance to be paid within fifteen days.

Each Record will be endorsed exactly the same.

CRIMINAL LAW
Sentences—Florida

State of FLORIDA ex rel. Charlie COPELAND, Jr. v. Nathan MAYO, Prison Custodian of the State of Florida.

Supreme Court of Florida, Division A, April 27, 1956, 87 So.2d 501.

SUMMARY: The relator, a Negro, was indicted, tried and convicted of rape in a state court in Florida. The jury which convicted him did not recommend mercy and he was sentenced to death in accordance with the state law. The Florida Supreme Court affirmed the conviction and the United States Supreme Court refused to grant a writ of certiorari. Relator then brought this petition for a writ of habeas corpus on the ground of denial to him of the equal protection of the laws guaranteed by the Fourteenth Admendment to the United States Constitution. The specific ground of denial was alleged to be that juries in Florida had systematically refused to recommend mercy toward Negro men convicted of raping white women while so recommending when the defendant was white. The Florida Supreme Court held that the failure to raise this question in the prior proceedings constituted a waiver of the ground and further stated that the allegations of denial of equal protection were without validity in this case.

TERRELL, Justice.

July 24, 1953, petitioner was indicted for rape in Duval County. He was tried and convicted September 23, 1953, without recommendation for mercy and was sentenced to death by electrocution. On appeal to the Supreme Court of Florida his conviction was affirmed and mandate transmitted to the Circuit Court December 16, 1954, 76 So.2d 137. Petition for writ of habeas corpus was denied by the Supreme Court of Florida March 1, 1955, 78 So.2d 399. Certiorari to the Supreme Court of the United States was denied October 10, 1955, 350 U.S. 851, 76 S.Ct. 92. Petitioner alleges that petition for habeas corpus was denied by United States District Court, Southern District of Florida, April 21, 1956, on the ground that the question, being the same as that raised here, had not been presented to the Supreme Court of Florida.

[*Petition for Habeas Corpus*]

Petitioner now seeks relief in this court by writ of habeas corpus on the grounds (1) that the death sentence imposed on him is excessive and discriminatory and deprives him of the equal protection of the law in that it is violative of Section 1, Declaration of Rights, Constitution of Florida, F.S.A., and the Fourteenth Amendment to the Constitution of the United States, in that the death penalty for the crime of rape is meted out almost exclusively to defendants of petitioner's racial identity; (2) petitioner further alleges that for a period of more than 20 years only one white defendant has been executed for rape in Florida while over twenty-three colored defendants have been executed for rape; that at least two white defendants have in recent years been convicted of rape and both received recommendations to mercy, avoiding the death penalty; (3) petitioner further alleges that the jury has for more than 20 years consistently returned verdicts without recommendation to mercy in cases where defendants were colored citizens and the victims were white females, "but that during the same period has almost never brought back a verdict of guilty without a recommendation of mercy where the defendants are members of either the colored or white race"; the jury returning the verdict in this case without recommendation to mercy, subjecting defendant to the death penalty, is a denial of defendant's rights to equal protection of the laws as prescribed in Section 1, Declaration of Rights, Constitution of Florida, and the Fourteenth Amendment to the Federal Constitution in that the death penalty is meted out only to members of defendant's racial identity when the victim is of different racial identity than the accused; (4) petitioner further alleges that his rights as set forth herein have not been previously adjudicated by the Supreme Court of Florida or the Supreme Court of the United States; however, the case of State v. Jimmie Lee Thomas is now pending before the Supreme Court of Florida where the precise issue set out herein

was timely raised and that to execute petitioner prior to the disposition of the Jimmie Lee Thomas case would subject him to death penalty "which may be unconstitutional"; (5) the petitioner further alleges and shows that he is without funds to pay the costs of this proceeding and cannot raise any money to pay same, and unless the costs thereof are taxed against the State of Florida, your petitioner will be unlawfully deprived of the writ of habeas corpus. The petition contains the appropriate prayer for relief and that upon final hearing petitioner's sentence be declared null and void and that he be returned to the proper court to be sentenced according to law.

The point for determination is whether or not on the showing made by the petition as detailed in the previous paragraph the writ of habeas corpus should be granted.

[*Ground for Petition*]

Summarized, the sole ground relied on for issuance of the writ of habeas corpus is embraced in the allegation, "history shows that the jury has, over a long and extended period of years, to wit, over 20 years, consistently returned verdicts without recommending mercy in cases where the defendants were colored citizens and the victims were white female citizens, but during the same period of time has almost never brought back a verdict of guilty without recommendation of mercy where the defendants are members of the white race and the victims are members of either the colored or white race; the jury returning a verdict in this case without a recommendation of mercy, and subjecting this defendant to the death penalty, is a denial of defendant's rights to the equal protection of the laws as prescribed in the Constitution of Florida, the Declaration of Rights, Section 1, and the United States Constitution, Fourteenth Amendment, in that the death penalty is meted out only to members of the defendant's racial identity where the victim is of a different racial identity than that of the accused."

Throughout his trial in the Circuit Court, on his appeal to this court, including proceedings before the Federal Courts enumerated herein, petitioner was ably represented by competent counsel who made available every defense known to the law in his behalf. In none of these proceedings has the question now raised been presented. Since the point now presented has not been previously raised, despite ample opportunity to do so, under well settled rules of decisions, we are driven to the conclusion that he has waived or forfeited the right to raise it. Baker v. State, 150 Fla. 446, 7 So.2d 792; Jennings v. Illinois, 342 U.S. 104, 72 S.Ct. 123, 96 L.Ed. 119; Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541; Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453; State ex rel. Linick v. Coleman, 144 Fla. 458, 198 So. 100; Skipper v. Schumacher, 124 Fla. 384, 169 So. 58, certiorari denied 299 U.S. 507, 57 S.Ct. 39, 81 L.Ed. 376; Collingsworth v. Mayo, Fla., 37 So.2d 696; Harlan v. McGourin, 218 U.S. 442, 31 S.Ct. 44, 54 L.Ed. 1101, 21 Ann.Cas. 849.

In his petition for habeas corpus petitioner offers no reason for his failure to raise the point now asserted. He should have raised it in his original trial and had ample opportunity to do so. It is settled law in this country that a defendant in a subsequent proceeding whatever its nature, cannot raise issues that were previously raised and determined or that he had a fair and adequate opportunity to raise and have determined in previous proceedings. State ex rel. Johnson v. Mayo, Fla., 69 So.2d 307, certiorari denied 347 U.S. 992, 74 S.Ct. 855, 98 L.Ed. 1125; Irvin v. State, Fla., 66 So.2d 288, certiorari denied 346 U.S. 927, 74 S.Ct. 316, 98 L.Ed. 419; Washington v. Mayo, Fla., 77 So.2d 620, 621; Irvin v. Chapman, Fla., 75 So.2d 591, 593; State ex rel. Copeland v. Mayo, Fla., 78 So.2d 399. These cases approve the doctrine that habeas corpus may not be used as a vehicle to raise for the first time questions that petitioner had a fair and adequate opportunity to raise and could and should have raised during the formal trial of the cause and on appeal.

[*Ground Without Validity*]

Aside from the holdings pointed out, on the merits, we do not think there is anything to the point raised. It is not shown to have any bearing on or relation to the case at bar. The historical fact that over a period of 20 years or more one white man and 23 Negroes have been tried and convicted for rape in Florida offers no lead to the correct determination of this case. The facts in none of these cases are shown to be remotely relevant to the case at bar and the points of law raised are not shown to be parallel

in the slightest. To a sociologist or a psychologist in some fields of research they would no doubt have value, but in a court of law as presented they are devoid of force or effect.

The petition for habeas corpus is therefore denied.

DREW, C. J., and THOMAS, ROBERTS, THORNAL and O'CONNELL, JJ., concur.

TRIAL PROCEDURE
Argument of Counsel—Alabama

See: Employment, Labor Unions—Alabama, immediately following.

EMPLOYMENT
Labor Unions—Alabama

Burl McLEMORE v. INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, C.I.O., an unincorporated organization, et al.

Supreme Court of Alabama, February 2, 1956, 88 So.2d 170. Rehearing denied June 21, 1956.

SUMMARY: The plaintiff brought an action against the UAW and others in an Alabama state court for having prevented him from working at his job. He recovered a verdict in the trial court and the defendants moved for a new trial. The basis for the motion for new trial was that plaintiff's counsel had made inflammatory statements in his argument, concerning picketing by Negro members of the defendant union and the provisions of the union's constitution with respect to equality. On appeal the Alabama Supreme Court affirmed the granting of a new trial, stating that the argument of counsel was "so grossly improper and highly prejudicial that its evil influence could not be eradicated from the minds of the jury by any admonition of the trial judge."

MERRILL, Justice.

Plaintiff McLemore sued the defendant Unions and one Michael Volk, alleging that they prevented him from working at his job at the copper plant in Decatur, by means of unlawful picketing and committing an assault and battery on him. The jury awarded a verdict of $8,000. Defendants filed a motion for a new trial which was granted, and it is from that ruling that this appeal is taken.

In the language of the trial judge, "the pivotal question raised by the motion for a new trial is whether the arguments of one of plaintiff's attorneys complained of, constituted such prejudical error as to require a new trial". The questioned argument was not objected to at the time of its utterance; thus, no part of same was reported by the court reporter. The matter was presented on the hearing of the motion for a new trial by three affidavits; one by an attorney for the defendants, one by the plaintiff and one by one of plaintiff's attorneys, Mr. Horace C. Wilkinson.

We quote from amended ground 88 of the motion for the new trial, which adequately shows the matters complained of:

> "88. For that, in closing argument, Mr. Horace Wilkinson, attorney for the plaintiff, made certain highly and grossly inflammatory, erroneous, illegal and prejudicial remarks and arguments, and engaged in highly prejudicial conduct in an appeal to the racial bias and prejudice of the jury, which remarks, arguments and conduct necessarily inflamed and prejudiced the minds of the jury against the defendants, and entered into and affected the verdict of the jury adversely to the defendants, and which remarks were incurable and demand the grant of a new trial to the defendants,

said remarks, arguments and conduct being in substance as follows, and said remarks being stated to the jury on two occasions in said argument:

"Before his argument Mr. Wilkinson wrote on the floor of the court room next the counsel table of the defendants and in front of the jury, the word 'Equality' in large letters and with white chalk; and on the floor of the court room next the counsel table of the plaintiff, and in front of the jury the word 'Liberty' in large letters with white chalk. On the word 'Equality' he placed the Constitution of the defendant union, and on the word 'Liberty' he placed a volume of the Code of Alabama. During said argument Mr. Wilkinson pointed to the word 'Liberty' and the volume of the Code of Alabama, stating in substance that the Constitution of the United States and the Constitution of the State of Alabama guaranteed to the plaintiff liberty in his right to work free from interference, and pointing to the word 'Equality' and the Constitution of the defendant Union, stating in substance that there is not one thing in the Constitution of the United States or in the Constitution of Alabama about equality; and in connection with said argument Mr. Wilkinson stated in substance that he would not walk a picket line with a Negro and that he would not belong to any union which admitted Negroes to membership or that there are still people in Morgan County who would not walk a picket line with a Negro and that there are still people in Morgan County who would not belong to any union which admitted Negroes to membership. It was in evidence that Negroes were admitted to membership in the defendant union in Decatur, Alabama and participated in picketing during the strike in issue."

The body of Mr. Wilkinson's affidavit is as follows:

"Horace C. Wilkinson being duly sworn says that during his argument to the jury in McLemore's case against the Union affiant referred to the historical fact that Jefferson's statement in the Declaration of Independence that 'all men are created equal' was a false philosophy that never took root in America and was used by Jefferson to enlist support of the French. That when the National Constitution was written the 'all men are created equal' doctrine was abandoned and in its place our forefathers said they were founding our system of government

> to secure for ourselves and our posterity the blessings of liberty.

"Affiant further stated that a carpet bag constitution contained the doctrine that 'all men are created equal' was forced on the people in 1867 and as soon as Governor Houston redeemed the State in 1875 a new Constitution was adopted in which the 'all men are created equal' doctrine was discarded and in its place the doctrine that all men are equally free and independent was made Article 1 of the new Constitution, which was carried forward into the Constitution of 1901 where it has remained to this day.

"It was in evidence that the Union had several Negro members who attended the Union meetings and walked the picket line. Defendants' counsel repeatedly criticized McLemore for not abiding by the will of the majority. They argued that the will of a majority of the employees was to strike the plant and to picket it. In reply to that affiant stated: They criticized McLemore for not abiding by the will of the majority. There are men in Morgan County who will not sit in a Union Hall with a Negro. There are men in Morgan County who will not walk a picket line with a Negro. I don't blame them. They have as much right to their opinion about that as the Union has to a contrary opinion. They have as much right to have their wishes respected as others have to have their wishes respected. Affiant never stated, so far as he can recall, that he wouldn't picket with a nigger. Neither did he say, so far as he can recall, that he would not belong to an organization that had niggers for members. Affiant had no reason to refer to his personal attitude towards such matters.

"Affiant did point out that in incorporating the doctrine that 'all men are created equal' in its Constitution, the Union was standing for a doctrine that was repudiated

when the National Constitution was written and for a doctrine which was thrown out of the window by the people of Alabama. Affiant further says that his argument that there were men in Morgan County who would not sit in a Union Hall with a Negro and would not walk a picket line with a Negro was solely in reply to the argument repeatedly made by counsel for defense that all the hourly paid employees who attended the union meeting unanimously voted to strike and to picket, and that McLemore was not willing to go along with them.

"Affiant did not state that the union sought to enforce equality on all employees by means of the strike in issue. No objection was made to the argument of affiant before the verdict was returned in said cause.

"Affiant did write 'Liberty' and 'Equality' on the floor of the court room in front of the jury and he placed the Constitution of the Union, which had been introduced in evidence, beside the word 'Equality' and affiant appealed to the jury to stand behind the Constitution of the State and Nation instead of the false doctrine in the Union Constitution.

"Affiant had with him at the time and very closely followed parts of the address of Hon. R. Carter Pittman to the Bar Association, printed in the *Alabama Lawyer*, October, 1954—beginning at page 343, entitled Liberty or Equality."

[*Influence of Argument*]

The appellant's first contention is that "the verdict of the jury was not contrary to the evidence and was not excessive and hence was not the result of improper argument". This same argument was made in the case of Williams v. City of Anniston, 257 Ala. 191, 58 So.2d 115, 117, wherein we said:

> "The test, however, is not that the argument did unlawfully influence the verdict, but that it might have done so. City of Montgomery v. Quinn, 246 Ala. 154, 19 So.2d 529; Roan v. State, 225 Ala. 428, 143 So. 454."

Applying this test, as did the trial judge to the facts in the instant case, we are unable to say that the questioned argument might not have influenced the verdict.

It is also contended that the action of the trial judge in granting the motion for a new trial on the ground of improper argument was a determination that there was no merit in any other ground of the motion, including grounds that the verdict was excessive, was the result of bias or prejudice, or was contrary to the evidence. This argument cannot prevail. A determination by the trial judge that one ground for a motion for a new trial has merit, is not, without more, a determination that all other grounds of the motion are without merit. We said in the case of Rhodes v. Roadway Express Co., 261 Ala. 14, 73 So.2d 740, 742,

> "In reviewing the action of the trial court in granting a motion for new trial, the inquiry is not limited to the grounds on which the motion was granted. Sullivan v. Alabama Power Co., 246 Ala. 262, 269, 20 So.2d 224. And it is open to appellee to show error in the trial on any other of the grounds assigned in the motion. Sullivan v. Alabama Power Co., supra; Thomas v. Carter, 218 Ala. 55, 59, 117 So. 634. However, when as here, the trial court specifies the ground upon whch the motion is granted, this court, when considering another ground of the motion, will not indulge in favor of such other ground the presumption which we would accord the ground specified. Cook v. Sheffield Co., 206 Ala. 625, 626, 91 So. 473."

[*Inducement to Argument*]

It is next contended that the questioned argument was provoked by improper argument of opposing counsel and that it was retaliatory and in reply to such improper argument. The finding of the trial judge in this regard, was in part as follows:

> "* * * This Court is at the conclusion the language here used and complained of was not logically provoked or invited by the argument made by the defendants' attorney and not justified by it. A legitimate argument by one attorney does not justify an illegitimate reply by his opponent in retaliation."

We think the above finding is supported by

the evidence. The fact that Negroes attended the Union meetings and participated in picketing was brought out not by the defendants but by the plaintiff. Likewise, the copy of the Union's Constitution, which was in evidence, was introduced by the plaintiff and not by the defendants.

[*Appellants' Contention*]

Appellants next contend that "since defendants interposed no objection to the argument at the time it was made, and therefore speculated on the verdict of the jury, they should not be heard to complain of the argument." It is true as a general rule, improper argument of counsel does not constitute grounds for a new trial unless there is timely objection or a motion to exclude, a ruling thereon by the Court and an exception thereto, or a refusal by the Court to make a ruling. However, as stated in Anderson v. State, 209 Ala. 36, 95 So. 171, 179,

> "An exception to the general rule requiring appropriate objection or motion invoking corrective instruction or action by the trial court is where the remark or argument of counsel is so grossly improper and highly prejudicial to the opposing party as that neither retraction nor rebuke by the trial court would have destroyed its sinister influence (B. R. L. & P. Co. v. Gonzalez, supra [183 Ala. 273, 61 So. 80]; Moulton v. State, supra [199 Ala. 411, 74 So. 454]; B. R. L. & P. Co. v. Drennen, supra [175 Ala. 338, 57 So. 876]; L. & N. v. Sullivan Timber Co. supra [126 Ala. 95, 27 So. 760]; Florence C. & I. Co. v. Field, 104 Ala. 480, 16 So. 538; Birmingham Nat. Bank v. Bradley, 108 Ala. 205, 19 So. 791; Wolffe v. Minnis, supra [74 Ala. 386]), as recognized appeals to race or class prejudice (Tannehill v. State, 159 Ala. 51, 48 So. 662; James v. State, 170 Ala. 72, 74, 54 So. 494; B. R. L. & P. Co. v. Drennen, supra; L.R.A. 1918D, 10, 24, 32, notes; Moulton v. State, supra)."

Two of our most recent cases which recognize the existence of the quoted execption are Washington v. State, 259 Ala. 104, 65 So.2d 704, and Jackson v. State, 260 Ala. 641, 71 So.2d 825.

We are impressed by a statement of the trial judge in his opinion on the motion for the new trial where he stated

> "The argument set forth in the affidavit of the attorney was calculated to excite the minds of the jury and stir their resentment and to prejudice them against an organization that stood for the equality of the races. Unquestionably, recent events have created an atmosphere that is sur-charged with uncertainty, apprehension and a feeling that sacred constitutional rights are being invaded. We all have to take a grip on our tempers. Words that heretofore would be heard with equanimity may now inflame and burn. This Court is unable to escape the conclusion that the argument was highly prejudicial. This Court, also, confesses its dereliction in not acting *sua sponte* in stopping the argument before it had gone too far."

We are at the conclusion as was the trial judge, that the argument here complained of should not have been indulged. In the case of Loeb v. Webster, 213 Ala. 99, 104 So. 25, 27, this Court stated:

> "This court has frequently held an appeal to race prejudice constitutes a most serious breach of the privilege of argument to the jury, and such appeals have met with frequent condemnation by this court. Tannehill v. State, 159 Ala. 51, 48 So. 662; Anderson v. State, 209 Ala. 36, 95 So. 171; Moulton v. State, 199 Ala. 411, 74 So. 454. We see no occasion for any race question to have been injected into the statement of the case, nor justification therefor, and we will assume that as a matter of course this question will not again arise upon another trial of the cause".

[*Duty of Trial Judge*]

The position of a trial judge is such that he is better able than we to ascertain the extent to which improper arguments may have on the minds of jurors. It is the duty of the trial court on motion to set aside a verdict and grant a new trial if the judge has a definite and well considered opinion that such improper argument was prejudicial to the extent that its harmful influence was not or could not be eradicated. Certainly the trial judge in the instant case deemed it necessary under the circumstances to grant a new trial. And because he saw and heard the parties, observed the jurors and their

reaction, presumption is indulged in favor of his ruling granting or refusing a new trial. 2 Ala. Digest, Appeal and Error, 933(1).

We are convinced that under the circumstances existing in this case, that the argument of counsel was "'"so grossly improper and highly prejudicial, that its evil influence and effect could not be eradicated from the minds of the jury by any admonition from the trial judge"' ". National Biscuit Co. v. Wilson, 256 Ala. 241, 54 So.2d 492, 497; Alabama Great Southern R. Co. v. Gambrell, 262 Ala. 290, 78 So.2d 619.

The judgment of the circuit court is affirmed.

LAWSON, SIMPSON, STAKELY, GOODWYN and MAYFIELD, JJ., concur.

LIVINGSTON, C. J., dissents.

EMPLOYMENT

Labor Unions—Wisconsin

BRICKLAYERS, Masons, Marble Masons Protective INTERNATIONAL UNION NO. 8, of Wisconsin v. INDUSTRIAL COMMISSION OF WISCONSIN.

Circuit Court, Dane County, Wisconsin, July 31, 1956.

SUMMARY: A complaint before the Industrial Commission of Wisconsin under the "fair employment statute" of that state against a local of the Bricklayers Union alleged that the union had refused membership to two named persons because of their race. The Commission held hearings on the complaint and made findings that discrimination had been practiced. The Commission, under the statute, recommended that the union admit the two persons to membership. The union brought the present action in a Wisconsin state court to have the findings and recommendations of the Commission set aside. The court, without reaching the issue of refusal of membership, held that the order of the commission, being merely an unenforceable recommendation, was not subject to review by the court.

O'CONNELL, Circuit Judge.

OPINION AND DECISION

NATURE OF THE ACTION BEFORE THE COURT:

The matter before the Court is an action, under Chapter 227 of the Wisconsin Statutes, to set aside the findings and recommendations of the respondent, which found that the petitioner refused membership to Randolph Ross and James Harris because of their race, and recommended that the petitioner admit Randolph Ross and James Harris to membership in the union, and directed that its findings be publicized.

The case was tried on the record transmitted by the respondent.

Many issues were raised by the attorneys for the parties, and the attorney for Randolph Ross and James Harris.

The first issue to be considered is whether the Findings and Recommendations of the Industrial Commission of Wisconsin are reviewable under Chapter 227 of the Wisconsin Statutes. If the findings and recommendations are held not to be reviewable, then the other questions need not be decided.

ARE THE FINDINGS AND RECOMMENDATIONS REVIEWABLE?

Testimony before the Commission was reviewed, oral arguments were made and briefs were filed.

The authorities listed by the attorneys have been considered, and certain statutes and cases and authorities will be here mentioned.

Sec. 111.35 Wis. Stats., under the heading "Investigation and Study of Discrimination," provides that the Industrial Commission shall:

(1) Investigate the existence, character, causes and extent of discrimination in this state, and the extent to which the same is susceptible of elimination.

(2) Study practical ways and formulate plans for the elimination of any discrimination found to exist, by education or other practicable means.

(3) Publish and disseminate reports embodying its findings and the results of its investigations and studies relating to discrimination and ways and means of reducing or eliminating it.
(4) Confer, co-operate with and furnish technical assistance to employers, labor unions, educational institutions and other public or private agencies in formulating programs, educational, or otherwise, for the elimination of discrimination.
(5) Make specific and detailed recommendations to the interested parties as to the methods of eliminating discrimination.

Sec. 111.36, under the heading "Commission Powers," provides:

"The commission may receive and investigate complaints charging discriminatory practices in particular cases, and give publicity to its findings with respect thereto."

Sec. 227.01 provides, in part, as follows:

"(3) 'Contested case' means a proceeding in which, after hearing required by law, the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding, and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding."

Sec. 227.15, concerning "Judicial Review," provides, in part, as follows:

"Judicial review: orders reviewable. Administrative decisions, which directly affect the legal rights, duties or privileges of any person, whether affirmative or negative in form, *** shall be subject to judicial review as provided in this chapter;***"

Sec. 227.16 provides, in part, as follows:

"Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in section 227.15 and directly affected thereby shall be entitled to judicial review thereof as provided in this chapter. *** "

Sec. 227.20 provides, in part, as follows:

"Scope of review. (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony may be taken in the court. The court may affirm the decision of the agency, or may reverse or modify it if the substantial rights of the appellant have been prejudiced as a result of the administrative findings, inferences, conclusions or decisions being:
(a) Contrary to constitutional rights or privileges; or
(b) In excess of the statutory authority or jurisdiction of the agency, or affected by other error of law; or
(c) Made or promulgated upon unlawful procedure; or
(d) Unsupported by substantial evidence in view of the entire record as submitted; or
(e) Arbitrary or capricious."

Other sections of the statutes were cited and read by the court.

The fair employment statutes, Secs. 111.31 to 111.36 were based upon Chapter 490. Laws of 1945. The bill which caused Chapter 490 to become a law Bill 131 S originally contained provisions authorizing the commission to issue enforceable orders, and allowing judicial review, but these provisions were eliminated from the bill by Substitute Amendment No. 1, S before it was passed.

Sec. 328.021 Wis. Stats. was cited, but this statute only allows a court to take judicial notice of rules, regulations and orders having the force and effect of laws, of state boards, commissions and agencies.

In 245 Wis. 636, United R. and W. D.S.E. of A.VS. Wisconsin E.R. Board (1944) a judicial review was sought by a union, under Chap. 227 of an order which provided that a referendum be held by the employees of a company. The court, at page 641, held that Chapter 111 of the Statutes did not provide that an order be reviewable, and furthermore the court held that it did not appear that the union was an aggrieved party or was directly affected by the order.

In 253 Wis. 584, (1948) Wisconsin Telephone Co. V. Wisconsin E. R. Board, the court cited 245 Wis. 636, cited above, and stated:

"Likewise, as in the case at bar, the employer is not directed to do or to refrain from doing anything by the board's preliminary action in merely appointing the conciliator, and the employer can no more be aggrieved thereby than the union could be considered aggrieved by the board's order for the referendum in the case last cited."

Court held that such an order is reviewable only if made so by statute.

4 Am. Jur. Associations and Clubs, Sec. 11 contains this statement:

"Membership in a voluntary association is a privilege which may be accorded or withheld, and not a right which can be gained and then enforced.

"The courts cannot compel the admission of an individual into such an association, and if his application is refused, he is entirely without legal remedy, no matter how arbitrary or unjust may be his exclusion."

In 255 Wis. 252, Munninghoff vs. Wis. Conservation Commission, the court held that a decision of the commission in denying the plaintiff a license for a muskrat farm was reviewable under Chap. 227.

In 271 Wis. 442, Greenfield vs. Joint County School Committee, it was held that the right of appeal is statutory, and does not exist except where expressly given, and cannot be extended to cases not within the statute.

In denying the right to the Town of Greenfield to appeal from an order of the school committee, this statement was made (page 447)

"A person is aggrieved by a judgment whenever it operates on his rights of property or bears directly on his interest. An "aggrieved party" within the meaning of a statute governing appeals is one having an interest recognized by law in the subject matter which is injuriously affected by the judgment. In re Fidelity Assur. Asso. (1945), 247 Wis. 619. The word "aggrieved" refers to a substantial grievance, a denial of some personal or property right or the imposition of a burden or obligation. Bowles V. Dannin (1938) 62 R.I.36,2 Atl. (2nd) 892"

CONCLUSIONS AND DECISION:

The Court concludes and decides as follows:

1. That the findings and recommendations of The Industrial Commission upon which a review has been requested, and from which an appeal has been taken, did not *order* the petitioner to do or refrain from doing any particular things. Only recommendations were made, and no provision for enforcement was provided by law.

2. That the findings and recommendations did not directly or injuriously affect the petitioner, or its rights, duties or privileges.

3. That the findings and recommendations did not affect petitioner's personal or property rights, and no burden or obligation was imposed thereby.

4. That petitioner is not an aggrieved party, and is not a party directly affected by the findings and recommendations.

5. That there is no statutory provision, and there is no provision allowed by law, for an appeal or a review, in a case such as the one before the court.

6. That the findings and recommendations, attempted to be made the subject of review in this case, are not legally subject to appeal or review.

7. That the petition of the petitioner, before the court, should be and is dismissed, for lack of jurisdiction.

8. That an order in accordance herewith may be drafted and presented for signing and filing herein.

9. That no costs be taxed herein by any party against any other party.

FAMILY RELATIONS

Birth Certificates—Louisiana

Robert GREEN v. CITY OF NEW ORLEANS (Department of Public Health)

Court of Appeal of Louisiana, Orleans, June 11, 1956, 88 So.2d 76.

SUMMARY: The plaintiff, a Negro, brought suit against the City of New Orleans to obtain a writ of mandamus to compel the Bureau of Vital Statistics of that city to change the entry as to race on the birth certificate of a child from "white" to "Negro". The child had been born to a white woman who subsequently died. No information as to the father of the child was known. The race of the child had been entered on its birth certificate as "white" without ascertaining the race of the father. The child was later placed in a Negro foster home from which the plaintiff sought to adopt it, but was prevented from doing so because of the recorded race of the child. The Court of Appeal of Louisiana held that the records could not be changed unless the evidence adduced was sufficient to show no doubt as to their incorrectness, and that there was doubt in this case that the child was part Negro. One judge dissented on grounds that any possible doubt as to the incorrectness of the records was too minor to be given consideration.

REGAN, J.

Plaintiff, Robert Green, a colored adoptive applicant, instituted this suit against the defendant, City of New Orleans, Bureau of Vital Statistics, endeavoring to obtain a writ of mandamus compelling the defendant to change the race, as revealed in the birth certificate of Jacqueline Ann Henley, age about four and a half years, from white to colored or to show cause why such change should not be made; plaintiff then requested that a curator ad hoc be appointed by the court to represent the interest of the minor child.

No answer appears in the record on behalf of the Bureau of Vital Statistics, however, Frank J. Stich, Jr., the curator ad hoc answered and generally denied the pertinent allegations of plaintiff's petition.

From a judgment in favor of defendant dismissing plaintiff's suit, he has prosecuted this appeal.

[*Recitation of Facts*]

The chronological facts are relatively simple. On November 2nd, 1950, Ruby Henley Preuc[1], a white woman gave birth to a female child, Jacqueline Ann Henley[2] while confined in the Charity Hospital of New Orleans. Three weeks after the birth of the child Ruby Preuc brought it to the home of her sister, Mrs. Harold McBride. The identity of the child's father was never revealed to anyone by its mother and, therefore, he is, at present, unknown. On October 11, 1952, Ruby Preuc died of a brain tumor in the Home for Incurables, where she had been confined since shortly after the birth of her child. On August 1, 1952, Mrs. McBride visited the Department of Welfare and requested it to accept the child as she felt that it was a Negro and she could no longer permit her to remain in her home, since the neighbors were beginning to comment about the medium brown color of the child's skin. In order to facilitate this request proceedings were initiated wherein the child was declared abandoned by the Juvenile Court for the Parish of Orleans and, on October 1, 1952, it was placed in a Negro foster home where she has remained.

[*Adoptive Efforts*]

Plaintiff endeavored to adopt the child through the use of the facilities of the Department of Welfare, which approved his application, but an examination of the child's birth certificate disclosed an impediment in that she was registered as white in the Bureau of Vital Statistics, and that agency refused to change the designation of the race of the child to colored. Hence this suit.

The only question posed for our consideration is one of fact and that is whether Jacqueline Ann Henley has been proven to be a member of the Negro race?

1. Divorced by Harry Preuc on January 5, 1949, in the State of Kansas.
2. Henley was the mother's maiden name.

Plaintiff contends that the lower court erred in its judgment, for the reason that sufficient evidence was offered during the trial hereof to prove that the child was a Negro. On the other hand, the curator ad hoc insists that the evidence adduced at the trial was not sufficient to compel the Bureau of Vital Statistics to change the birth certificate of the child from white to that of a colored person.

We feel compelled to remark at the inception of this opinion that we were completely fascinated by the novel-like tenor of this record. The trial judge, apparently in order to afford the plaintiff the benefit of every doubt and an unimpeded opportunity to prove his case with that legal certainty which the law requires, most liberally relaxed the rules of evidence, therefore, much of the testimony that we shall refer to or quote hereinafter, insofar as plaintiff's case is concerned, will, we believe, be predicated, to a large extent, on hearsay, inferences and presumptions of fact.

[*Plaintiff's Evidence*]

Counsel for plaintiff in order to sustain his client's contention that sufficient evidence was adduced in the trial court to prove that the child was, at least, part Negro, points to the testimony of Herbert Stanton, a Negro laborer, who related that Ruby Preuc was employed as a barmaid in a Negro saloon, a fact which everyone seems to have conceded. He further asserted that he corresponded with Ruby Preuc when she was visiting her sister in Detroit, Michigan. A letter was offered in evidence written, during this time, by Stanton to Ruby Preuc and it contained such phrases as "but you know that I'll always love you"; "I wish you was home I miss you so" and "with love, Rock[3]." On Direct and cross examination he further related that he had never "gone out" with her nor had he been "intimate with her" and upon being interrogated "Did you ever meet her after work?", he responded "* * * her boss used to bring her home * * * a white man."

Counsel conceded in oral argument that the testimony of Stanton and the letter were not offered to prove parentage, but merely to show Ruby Preuc's close association with Negroes.

Plaintiff offered in evidence the testimony of Mrs. Emma Smith,[4] who related that birth certificates were her special assignment and that it was she who had prepared the child's birth record. Upon being interrogated "The color and race of the father, do you ask that question?", she responded, "No, if she is a white mother. We do not ask if her husband is white, we take it for granted he is white." The certificate that Mrs. Smith prepares ultimately becomes the actual birth record and for that purpose it is forwarded to the Department of Public Health, a fact which was admitted by Mrs. Naomi Drake, Deputy Registrar of the Bureau of Vital Statistics for the City of New Orleans.

[*Sister's Testimony*]

Mrs. Harold McBride, sister of Ruby Preuc, testified that three weeks after the birth of the baby, Ruby Preuc and the child came to her home, wherein Ruby resided until she was removed to the Home for Incurables, where she subsequently died. Sometime after Ruby Preuc was confined in the Home for Incurables and about two months before she died, Mrs. McBride visited the Department of Public Welfare and requested it to accept the child because "she didn't fit in my family, she was too dark. * * * I told Mrs. Oberholtzer[5] there had been remarks passed that the child possibly was a nigger." However, Mrs. McBride, both on direct and cross examination, related that she had never seen her sister consort with Negroes "outside of work" and that she did not actually know if the child was part Negro.

Mrs. Catherine Oberholtzer testified that Mrs. McBride, when she visited her, stated that "she would like the agency to make plans for the child since she felt that she was a Negro and she could no longer keep her in the house; the child was growing darker day by day."

Charles Collins[6] testified that when Mrs. McBride visited his office she informed him that "* * * she lived in an all white neighborhood and that it would sooner or later be embarrassing * * * to have the child in her household. * * * because of its color."

[*Anthropologist's Testimony*]

The only expert witness offered to enlighten the court appeared on behalf of the plaintiff

3. Herbert Stanton's nickname.
4. An employee of the Medical Record Library of Charity Hosptal.
5. An employee of the Department of Public Welfare.
6. An attorney for the Civil Division of the Legal Aid Bureau.

and it is on his testimony that plaintiff rests his case. Dr. Arden R. King stated that he was a Professor of Anthropology at Tulane University and had done graduate work in physical anthropology and archeology. He related that the child was four and a half years of age at the time of his examination to determine if there was any possibility that she was part Negro. He testified at great length on two occasions and, in the final analysis, more briefly summarized what he had previously asserted:

> "There are three characteristics which are distinctly Negro in this child. One is the lip seam, the division between the integumental lip, the skin lip above here, and the mucous lip, is clearly marked, the little ridge; and secondly, the distinctly small, delicate ears; and third, perhaps the most indicative of all, there are concentrations of pigments in diagnostic positions of the anatomy.
>
> "While I could get these three characteristics occurring in an individual who had no Negro ancestry, it would be so rare—we have records of it—it would be so rare as not to be considered at all probable."

Upon being interrogated "* * * could you say positively there was some degree of Negro blood less than one-fourth, no matter how small?" he responded "* * * you ask me to not be scientific, and I can not. I won't go beyond saying extremely probable." Dr. King concluded by asserting that if this child was nine or ten years old he would then be in a more advantageous position to determine its race.

The curator ad hoc insists that the foregoing evidence is not sufficient to compel the Bureau of Vital Statistics to change the birth certificate of the child from white to that of a colored person and, therefore, requests that the judgment refusing the writ of mandamus be affirmed.

[*Summary of Testimony*]

The trial judge obviously was of the opinion that the plaintiff had failed to prove his case with that legal certainty which the law requires in cases of this nature and our examination of the record fails to disclose any error in his factual or legal conclusions. The testimony of Stanton was not offered by plaintiff to prove parentage, but merely to show Ruby Preuc's close association with a Negro or Negroes. The inference, of course, which plaintiff desired to create by virtue of Stanton's testimony was intimacy sufficient to create a presumption of fatherhood.

The testimony of Mrs. Emma Smith likewise was not offered to prove parentage, but to create a presumption of negligence in the Charity Hospital in failing to diligently endeavor to ascertain the race of the newborn infant before issuance of the birth certificate to the Bureau of Vital Statistics, which accepts it as such at face value.

Mrs. McBride's opinion of the race of the child, unsupported by evidence other than appears herein, certainly was not proof thereof.

As we have related hereinabove, in the last analysis, plaintiff rests his case on the testimony of Dr. Arden R. King, who qualified as an expert in the field of anthropology, which the record informs us is the science of man in relation to physical character, distribution, origin, classification and relationship of races. As we have seen, the very utmost that Dr. King could say with respect to this child being part Negro was that "this was an extreme probability."

It is well recognized that anthropology is an inexact science and, therefore, Dr. King could not say with certainty that the child was part Negro and that this uncertainty was accentuated by the tender age of the child. We believe that it is also well recognized that all the methods presently in use to determine race are precarious and that their provisional findings must be accepted with the utmost caution.

[*Degree of Proof*]

The general rule that a civil case need not be proven beyond a reasonable doubt is conceded. but we know of no case wherein the courts have applied this general rule when the purpose was to change the race of a person as disclosed in a birth or death certificate.

In the relatively recent case of State ex rel. Treadaway v. Louisiana State Board of Health, on rehearing, La.App.1952, 56 So.2d 249, 250, we said "there must be no doubt at all", and the following extract therefrom serves to point up the reason for this assertion:

> "In Villa v. Lacoste, 213 La. 654, 35 So.2d 419, 421, the Supreme Court, in discussing the effect of a certificate issued by the State Board of Health, said clearly that such certificates constitute only prima facie proof of

the correctness of the statements contained therein and held that such evidence as was introduced had been 'ample to overcome the prima facie case' made by the certificates themselves.

"We wondered whether we had accorded too great an effect to the certificate under attack here.

"In Sunseri v. Cassagne, 191 La. 209, 185 So. 1, 5, the Supreme Court, in another somewhat similar matter, held that a person who has been commonly accepted as being of the Caucasian race should not be held to be of the colored race *'unless all the evidence adduced leaves no room for doubt that such is the case.'*

"The Supreme Court remanded the matter in order that further evidence might be adduced and finally *held there was no doubt,* and maintained the correctness of the certificates which were there involved and which showed the defendant to be colored.

"We wondered whether the evidence here left no room for doubt.

"Thoroughly aware of the transcendent importance of our conclusion to those involved and to others affected though not parties, we diligently endeavor to convince ourselves that there might be room for doubt.

"We interpret the language used in the Sunseri case and quoted above as indicating that the proof in such case should be even more convincing than that which is necessary in such cases as must be proved 'beyond a reasonable doubt.' *We feel that the language used by the Supreme Court means that there must be no doubt at all.*

"However, as the Supreme Court found itself compelled to do when the Sunseri case was presented to it finally, Sunseri v. Cassagne, 195 La. 19, 196 So. 7, 9, we must hold that the evidence here leaves no room for doubt and that the certificate under attack should not be changed." (Italics ours.)

The Supreme Court granted a writ of certiorari in the foregoing case, 221 La. 1048, 61 So.2d 735, 739, and having satisfied themselves that this court's conclusions with respect to the facts and the law were correct, adopted the opinion of this court and, in the concluding paragraph of its opinion, asserted:

"Relator must show that he has a clear legal right to have the correction made. The legal certainty of the proof submitted must be such as to compel the Registrar of Vital Statistics to perform the ministerial duty of changing the recordation from 'Colored' to 'White'. The proof of record falls far short of any such assumption. As the name indicates, the records kept by the Registrar are vital to the general public welfare. *The registration of a birthright must be given as much sanctity in the law as the registration of a property right.*"

In view of the unequivocal rationale expressed in the foregoing cases we must entertain the opinion that the evidence adduced herein is not sufficient to compel the Bureau of Vital Statistics to change the birth certificate of the child from white to Negro at the present time. The final cause of law is the welfare of society. The rule that misses this aim cannot permanently justify its existence. The above jurisprudence is predicated on that major premise.

[*Inadvertently Dismissed*]

We notice that the trial court inadvertently dismissed plaintiff's suit. We believe that plaintiff should have been non-suited by virtue of the fact that the testimony of the expert Dr. King revealed that when the child was more developed and mature, he would then occupy an excellent position to testify with greater certainty as to its race.

For the reasons assigned the judgement appealed from is amended by dismissing the plaintiff's case as of non-suit and, as thus amended, it is affirmed.

Amended and affirmed.

[*Dissent*]

JANVIER, Judge (dissenting).

I do not retract one syllable of what was said in State ex rel. Treadaway v. State Board of Health, La.App., 56 So.2d 249, 250, and I agree that, as we said there, the language used by the Supreme Court in Sunseri v. Cassagne, 191 La. 209, 185 So. 1, should be interpreted as meaning that in practically all such cases vital statistics records should not be ordered changed unless there is "no doubt at all" of the incorrectness of those records. Nor do I to any extent criticize

my associates who feel that the record here leaves some possible doubt on the question of whether the little girl is a Negress.

[*Distinctions*]

There is a vast distinction between the facts of this case and the facts found in practically all other cases in which an effort has been made to force a change in such records. The distinction lies in the fact that here, at the very outset of our investigation, we find that the entry showing the race was made as a result of a presumption and not because of a stated fact.

In practically all cases the information as to the race, etc., is given by a member of the family and is based on knowledge or at least on a well founded belief as to the race of the parents. Here the record shows that no one gave any information as to the race of the father of the child and its race was stated as white merely because of the custom in the hospital that where a white mother gives birth to a child and there is no knowledge as to who is the father it is "presumed" that the father is white. The entry on the record of the Board of Health was made from information given by the hospital, which information was not based on knowledge but merely on the referred to presumption.

We know that the father was not white or Caucasian because on that point the anthropologist to whom I shall later refer says that he has no doubt at all. His only possible doubt was as to whether the race of the father might be something other than Negro though, as I will show hereafter, he found Negro characteristics and did not find any other characteristics. We start then with a record which we know is incorrect. I myself feel that there is no doubt at all and, being without doubt that the father was a Negro, I cannot permit myself to consent to a decree which must have a most harmful effect on the welfare of the little girl and to some extent on the public welfare as well.

There is no doubt in my mind that every person who has come into contact with this record really has no doubt at all that the little girl in question is a Negress. First of all, we notice that the aunt of the little girl (the sister of the mother) found it necessary to give up the custody of the child because she fully realized that it was a Negress. She so stated to at least two persons. Then the Welfare Association had no doubt at all of the race of the child and made arrangements for its adoption by a Negro family and only then discovered that its race had been registered as "white".

We come to the adoptive family and find that there is no doubt at all as to the race and this is evidenced by the attempt to force a change of the records so that it might be adopted as a Negro.

In my opinion there is no doubt in the mind of Dr. King, the Professor of Anthropology at Tulane University. He said that the father of the child was of other than the white race and that the only characteristics other than Caucasian which he could possibly identify were those of the Negro race, and that in his opinion the father was of the Negro race, but, when pressed as to whether he could positively say that there was no doubt at all, he merely said that personally he believed it, but that as a scientist he realized that there was the possibility of error from a scientific point of view and that therefore he could not say that, from that point of view, there was no doubt at all.

[*Effect on Child*]

A person of the Negro race has as much right to have such records correctly made as a person of the white race. And I cannot condemn this little girl to the humiliation and embarrassment which must ensue if this incorrect entry is to stand even for the five or six years suggested by my associates. There is no assurance that after the lapse of those five or six years another effort will be made to effect the necessary correction, and there will result the most unfortunate situation that the little girl registered as white will continue to associate with Negroes and that her social life will be only with Negroes and yet she will be unable to marry a Negro since, being registered as a white person, miscegenation laws will make such a marriage impossible. In fact, during the five or six years suggested by my associates she will labor under the embarrassment of associating socially only with Negroes who will no doubt taunt her with being registered as "white".

The record convinces me that she is of the Negro race and that we should so declare.

I respectfuly dissent.

CORPORATIONS
NAACP—Alabama

State of ALABAMA ex rel. John PATTERSON, Attorney General v. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Circuit Court of Montgomery County, Alabama, July 25, 1956, No. 30468.

SUMMARY: The Attorney General of Alabama brought suit in an Alabama state court seeking an injunction to restrain the National Association for the Advancement of Colored People from doing business in Alabama without complying with state laws concerning registration as a foreign corporation. A temporary restraining order was issued against the Association. 1 Race Rel. L. Rep. 707. Later the State filed a motion for the production of certain books, papers and other documents, including a membership list of the Association. Against objection the court ordered the production of the documents. On refusal of the Association to produce the documentary evidence, the court adjudged the Association in contempt and assessed a fine of $10,000 against it, to be raised to $100,000 if the order was not complied with in five days. (The order of the Alabama Supreme Court denying a petition for writ of certiorari to review the contempt decree and fine is set out *infra*, p. 919.)

JONES, Circuit Judge.

Decree Adjudging Respondent in Contempt and Fixing Punishment Therefor.

This suit seeks to enjoin among other things, the respondent from further conducting its business within the State of Alabama, seeks the dissolution of all its chapters in the State, and asks that on final hearing an order of ouster be entered against the respondent. Due and proper service of the bill has been had upon the respondent, and through its attorneys it has entered an unqualified appearance in the cause. A temporary restraining order was issued upon the filing of the bill. Later the State filed a motion to require respondent to produce certain books, documents and papers. This was duly set down for hearing before the court. At that time counsel for respondent objected to the motion to produce and the court ruled, as shown by its order on file, that certain books, papers and documents mentioned in the motion to produce should be brought into court, and a time was fixed for the production of the evidence requested by the State. Later the respondent moved the court to set aside the order to produce, assigning in substance that it had filed a full and complete answer, that the information called for by the State was already known to the Attorney General and that the books and papers were not now material or necessary to the trial and determination of the issues raised in the suit.

The motion to set aside the order to produce has been argued at length before the court by the Attorney General and by counsel for the respondent, and the respondent has offered oral testimony on the motion to set aside. Several hours have been consumed in hearing the matter in open court. The grounds of the motion to vacate are not well taken.

Upon the denial by the court of the motion to set aside the order to produce, the court offered respondent additional time to produce the documents heretofore ordered produced. Counsel for respondent stated in open court that additional time would not be required, that respondent would not produce the books, documents and papers as ordered by the court and that it elected to stand on its decision not to bring the papers into court for the inspection of the State.

[*In Contempt*]

This action of the respondent without question puts it in contempt of court, and its counsel practically concede this. So the respondent is in wilful contempt of the court, and the only matter before the court at this time is a formal order adjudging respondent in contempt and in taking judicial sanctions against it for its contempt.

The court adjudges and decrees that the respondent is in wilful contempt in failing to obey the order of the court to produce for inspection the documents referred to in the order to produce. This brings up now for the consideration of the court what punishment should be decreed against the respondent. Before fixing that punish-

ment these general principles of equity may be stated: The purpose of punishing for a contempt is to vindicate the dignity and authority of the court from the disrespect shown to its orders, to aid in compelling the performance of the court's order, performance which is confessedly in the power of the respondent at this time, and which performance respondent's counsel state will not be given. In the present contempt proceeding the court must consider the character and magnitude of the harm threatened by respondent's continued contumacy and the probable effectiveness of the sanction invoked.

Under the law, there is no way by which a corporation can be jailed or imprisoned, so a fine must be imposed, and in the imposition of this fine the presiding judge may properly consider the extent of the wilful and deliberate defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating respondent's defiance as required by the public interest, and the importance of deterring such acts in the future. The extent of the punishment is discretionary with the court.

[*Severe Punishment Required*]

The present wilful and deliberate, and considered, defiance of the court's order is not to be lightly taken. It is not such an act which admits of any but severe punishment. The court can not permit its orders to be flouted. It cannot permit a party, however wealthy and influential, to take the law in his own hands, set himself up above the law, and contumaciously decline to obey the orders of a duly constituted court made under the law of the land and in the exercise of an admitted and ancient jurisdiction. If this were allowed there would be no government of law, only the government in a particular case of the litigant who elected to defy the court for his own private and selfish ends. The respondent in this case has elected to stand on its brazen defiance of the order of a court with full power and authority to issue the order against it. Respondent having made its election to defy the court must abide the consequences of its stand. Upon a full consideration of the record in this case, it is

Ordered, adjudged and decreed by the court that National Association for the Advancement of Colored People is in contempt of court for its wilful and deliberate refusal to produce the documents described in the former order of the court in this cause.

Ordered, adjudged and decreed further by the court that as punishment for its said contempt the said National Association for the Advancement of Colored People be and it is hereby fined the sum of Ten Thousand Dollars, and judgement is hereby rendered against the said respondent and in favor of the State of Alabama for said sum of Ten Thousand Dollars, for which let execution issue.

Ordered, adjudged and decreed further that in the event the respondent fully complies with the court's order to produce within five days from this date, then it may move to have this fine reduced or set aside. However, in the event the respondent fails to comply fully with the order to produce within five days from this date, then it is ordered, adjudged and decreed that the fine for this contempt be $100,000.00.

Let the costs in this matter, to be taxed by the Register, be paid by the said National Association for the Advancement of Colored People.

Done in open court in the presence of the counsel for the parties to this suit on this July 25, 1956.

CORPORATIONS
NAACP—Alabama

Ex parte NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE [In re: State of ALABAMA ex rel. PATTERSON, Attorney General v. NAACP]

Supreme Court of Alabama, Special Term 1955-56, August 13, 1956, 3rd Div. No. 773

SUMMARY: The National Association for the Advancement of Colored People petitioned the Alabama Supreme Court for a writ of certiorari to review the action of the Circuit Court of Montgomery County, Alabama, in holding the association in contempt for refusing to produce certain documentary evidence and assessing a fine against it, *supra*, p. 917. The petition for certiorari was denied.

PER CURIAM.

Come the parties by attorneys, and the Petition for Writ of Certiorari to Montgomery Circuit Court, in Equity, the Motion of the Respondent (State of Alabama) to Strike the Petition for Writ of Certiorari, and the Demurrer and Answer of the Respondent (State of Alabama) to the petition, being argued and submitted and duly examined and understood by the Court,

IT IS CONSIDERED that the averments of the Petition for Writ of Certiorari to Montgomery Circuit Court, In Equity, are insufficient to warrant the issuance of a Writ of Certiorari,

IT IS THEREFORE CONSIDERED AND ORDERED that the petition be and the same is hereby denied.

All the Justices concur.

LEGISLATURES

EDUCATION

Public Schools—Florida

On July 16, 1956, the Special Advisory Committee appointed by the Governor of Florida to recommend legislative action relating to public school education and other matters with respect to the decision of the United States Supreme Court in the *School Segregation Cases* made its report. The text of that report follows. (See also the specific legislation adopted in Florida in this section.)

Tallahassee, Florida
Monday, July 16, 1956

His Excellency, the Honorable LeRoy Collins, Governor, and Members of the Cabinet of the State of Florida

Honored Sirs:

Your Committee which was appointed to study the Laws of the State of Florida and to recommend any changes, amendments or additions thereto deemed expedient after consideration of certain recent decisions of the Supreme Court of the United States, respectfully submits herewith its report.

In order that interested persons may know and understand the reasons for the creation of the Committee and the purposes for which it was formed, we submit a declaration adopted by the Committee, as follows:

It is the considered opinion of this Committee that, at the outset of its deliberations and in order that its members and other interested persons may better understand the reasons for its creation, a formal declaration of purpose should be made.

These are admittedly difficult times, when many ideas and suggestions are being expressed hurriedly and without due study. The carrying out of many of these ideas and suggestions would be harmful to our Constitution; would increase tension and feeling between the various groups of our citizenry; and would seek to challenge the authority of the United States of America. After careful consideration and deliberation this Committee has determined that its purposes and obligations are:

First: To maintain the public school system of the State of Florida.

Second: To endeavor to determine the best interests, from an educational standpoint, of all of the children of our State, to further such interests in every manner and to do all that is possible to achieve and maintain the highest possible intellectual, moral and cultural standards of our school system.

Third: To eliminate or to mitigate as much as possible any hostile feeling which might arise between any class or group of our citizens.

Fourth: To comply at all times and under all conditions with the provisions of the Constitution of the United States of America and the Constitution of the State of Florida.

Fifth: To determine, as thoughtful and responsible citizens of the State of Florida and the United States, Legislative measures to be considered by the Legislature of the State of Florida in keeping with the above-avowed purposes of this Committee; to recommend such action to the representatives of our State and its various subdivisions and to the people of the State as a whole; and to call upon all of the citizens of our State to keep these purposes in mind and to strive in their own conduct to effectuate these goals.

In accordance with our understanding of the purposes of the Committee as above set forth we respectfully recommend,

1. Enactment of a law vesting in County Boards of Public Instruction full power to

assign pupils to public schools on the basis of individual needs and abilities, providing for appeals from such assignments to the State Board of Education and for judicial review of such assignments, copy of such proposed law being filed herewith.

2. Enactment of a law regulating assignment of teachers, copy of such proposed law being filed herewith.

3. Enactment of a law vesting power in the Governor to promulgate and enforce rules and regulations relating to the use of any state, county or municipal park, building or facility that may be necessary or expedient to preserve the peace and tranquility of the State and prevent domestic violence, copy of such proposed law being filed herewith.

4. Enactment of an act clarifying and codifying the law relating to the powers of the Governor by proclamation to declare the existence of an emergency in the State or any portion thereof and to use all law enforcement officers and departments, including the military forces of the State, to prevent or suppress disorder, copy of such proposed law being filed herewith.

In the performance of our assigned duty we were and are confronted with recent decisions of the Supreme Court of the United States which violate accepted standards of judicial power, disrupt previous concepts of the relation between the Federal Government and the several States, disregard former decisions of the Court as to the rights of the States and the people, and destroy constitutional government as conceived by our forefathers.

These recent decisions of the Supreme Court transgress upon the rights of the people, encroach upon the powers of the Executive Department of the Federal Government, infringe upon the vested powers of Congress, ignore the rights of the States, violate the intent of those who wrote, proposed and adopted our Constitution and the Amendments thereto and in the aggregate constitute a usurpation of authority and a threat to constitutional government unparalleled in American History.

We, as members of your Committee recommend, most emphatically, that the invasion by the Supreme Court of the rights of the States, of the Legislative and Executive Departments of the United States and of the people be denounced in clear and unmistakable language and every lawful means be adopted to restore these rights, and curb this threat to our liberties.

The rights of a free people to protest against usurpation of power, to petition for redress of grievances, to demand that their public officers act within their assigned jurisdiction, are unalienable and inherent rights, which, as yet, have not been taken from us and we respectfully recommend that in the exercise of these rights that the Legislature, in the name and in behalf of the State of Florida and its people, denounce the usurpation of power by the Supreme Court and demand, as is the right of a free people, that their just and inherent powers be held inviolate.

Candor demands the immediate statement that the preparation of the following statement was begun with a view of demonstrating the gravity of the tragic impact of the "desegregation decisions" of the Supreme Court of the United States upon the institutions and peoples of the several States and the complete lack of constitutional justification of the decisions reached in those cases. However, a study of many other recent decisions of the Court obviously stemming from the same concepts of constitutional government that, in the minds of the members of the Court, justified the desegregation decisions leads unavoidably to the conclusion that the problem under consideration is not one which concerns the State of Florida alone, but every State and every citizen of the United States.

Nor does the problem arise out of a mere mistake in the pronouncement of the law upon one isolated subject, important as that may be. The entire American System of government is at stake.

In view of the gravity of the situation, the question of segregation or desegregation in public schools, the seriousness of which cannot be overemphasized, actually becomes one of secondary importance.

The candid reader is requested to ask himself whether the opinions herein referred to, when properly analyzed, do not impel the conclusion that the *Supreme Court of the United States has assumed the power, by judicial decree, to change the meaning of the Constitution of the United States,* and thus to amend the fundamental law of the land by the act of nine men, or a majority of them, rather than by the orderly processes set forth in the Constitution.

No matter how strongly the people of Florida may feel on the question of segregation, they recognize that citizens of other States have the right to entertain a different view. If the views of others attain that unanimity of popular support that is required to amend the Constitution of the United States, and such amendment be adopted, it is the duty of every American citizen to yield gracefully to the will of the people of the country as a whole. On the other hand, every thinking American knows that surrender to the Supreme Court of power to change the Constitution in order to effect reforms which members of the Court may deem beneficient, will vest in that Court power to make changes inimicable to the public welfare, and will eventually lead to a complete loss of control of the government by the people.

It is not the purpose of the present statement to attack or defend any of the decisions herein discussed insofar as the conclusions reached may or may not be sound or wise as abstract statements of what the law should be, or what the Constitution should, by amendment, be made to mean. Its sole purpose is to demonstrate the extent to which the Supreme Court has exceeded its judisdiction, has attempted to change the Constitution and has usurped powers belonging to other Departments of the Federal Government, the States, and the people.

Before going further we ask the reader to reflect upon, and to read this statement in the light of, the following words of George Washington taken from his "Farewell Address":

> "If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. *But let there be no change by usurpation;* for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed."

As we have candidly stated above, the preparation of the following declaration was begun as a protest against the decisions of the Supreme Court of the United States in the year 1954, abrogating the powers of the States to control their systems of education, but as we have studied the pronouncements of the Court in the recent past few months, we have come to the inevitable conclusion that the present membership of the Supreme Court of the United States has embarked upon a course of action designed to destroy the system of dual sovereignty, which is the unique feature and fundamental basis of our Union, to destroy the system of division of the powers of government between the Executive, Legislative and Judicial Departments, which is the greatest safeguard of the people against tyranny, and in complete disregard of the Constitution of the United States and the inherent rights of the sovereign States determined to arrogate to themselves final, complete, supreme and exclusive power over the States, the Federal Government and the people.

Your committee has set forth the basis of this conclusion in the following statement and respectfully recommends that the substance thereof be embodied in a Resolution of the Legislature of the State of Florida as a protest of the people of this State against this threat to our rights, as a demand for return to Constitutional Government, and as a call to our fellow Americans to join with us in preserving our inherent rights as a free people for all future time.

A Denouncement Of Usurpation Of Power And Demand For Preservation Of Our Inherent Rights

[*This portion of the Committee Report is substantially the same as Senate Concurrent Resolution No. 17-XX of the 1956 Special Session of the Florida Legislature, printed* infra *at p. 948, and is therefore omitted.*]

We attach to this report an Appendix of notes on decisions referred to in the above proposed Resolution.

We hope that our labors have provided some suggestions for the Legislative and Executive Departments of our state that will be helpful in preserving the rights of our state and of our people.

Respectfully submitted,
Judge L. L. Fabisinski,
Chairman

Judge Rivers Buford,
Vice Chairman

Judge Millard Smith
Cody Fowler
Luther Mershon
J. Lewis Hall
John T. Wigginton

[*The appendix of the Florida Committee Report is omitted. The appendix is entitled "A Denouncement of Usurpation of Power" and sets forth additional notes on the six decisions of the Supreme Court of the United States discussed in Florida Senate Concurrent Resolution No. 17XX* (infra, *p. 948*).]

EDUCATION

Public Schools—Florida

Chapter 31380 (Senate Bill No. 11-XX) of the session laws of Florida enacted by the 1956 Special Session of the Florida Legislature, approved July 26, 1956, enacts a "Pupil Assignment Law". This act provides for the assignment of public school pupils by county boards of public instruction on the basis of several factors and provides for review and appeals procedures of decisions of the county boards. See also the implementing regulations suggested by the Florida State Board of Public Instruction, *infra* at p. 961.

CHAPTER 31380
SENATE BILL NO. 11-XX

AN ACT relating to the management of the public schools at the local level; prescribing student admission policies with power to make appropriate rules and regulations and providing for the review of actions taken pursuant thereto; prescribing the duties of certain officials; authorizing the creation of advisory committees and study groups; authorizing employment of legal counsel; providing for surveys; authorizing redistricting of attendance areas and reallocation of school bus transportation routes; all pursuant to the police and welfare powers of the State; repealing Section 230.23 (6) g., Florida Statutes; providing effective date.

WHEREAS, this Act is enacted under the police and public welfare powers of the State to promote the health, safety, good order and education of the people within the State of Florida.

Now, therefore,

Be It Enacted by the Legislature of the State of Florida:

Section 1. The county board of public instruction of the several counties are hereby authorized and directed to provide for the enrollment in a public school in the county of each child residing in such county who is qualified under the laws of this state for admission to a public school and who applies for enrollment in or admission to a public school in such county. The authority of each such board in the matter of the enrollment of pupils in the public schools shall be full and complete. No pupil shall be enrolled in or admitted to attend any public school in which such child may not be enrolled pursuant to the rules, regulations and decisions of such board.

Section 2. In the exercise of the authority conferred by Section 1 of this Act upon the county boards of public instruction each such board shall provide for the enrollment of pupils in the respective public schools located within such county so as to provide for the orderly and efficient administration of such public school, the effective instruction of the pupils therein enrolled, and the health, safety, education and general welfare of such pupils. In the exercise of such authority the board shall prescribe school attendance areas and school bus transportation routes and may adopt such reasonable rules and regulations as in the opinion of the board shall best accomplish such purposes. The county boards of public instruction shall prescribe appropriate rules and regulations to implement the provisions of this subsection and other applicable laws of this state and to that end may use all means legitimate, necessary and proper to promote the health, safety, good order, education and welfare of the public schools and the pupils enrolling therein or seeking to enroll therein. In the accomplishment of these objectives the rules and regulations to be prescribed by the Board may include, but be not limited to, provisions

for the conduct of such uniform tests as may be deemed necessary or advisable in classifying the pupils according to intellectual ability and scholastic proficiency to the end that there will be established in each school within the county an environment of equality among pupils of like qualifications and academic attainments. In the preparation and conduct of such tests and in classifying the pupils for assignment to the schools which they will attend, the board shall take into account such sociological, psychological, and like intangible social scientific factors as will prevent, as nearly as practicable, any condition of socio-economic class consciousness among the pupils attending any given school in order that each pupil may be afforded an opportunity for a normal adjustment to his environment and receive the highest standard of instruction within his ability to understand and assimilate. In designating the school to which pupils may be assigned there shall be taken into consideration the available facilities and teaching capacity of the several schools within the county, the effect of the admission of new students upon established academic programs, the suitability of established curriculum to the students enrolled or to be enrolled in a given school, the scholastic appitude, intelligence, mental energy or ability of the pupil applying for admission and the psychological, moral, ethical and cultural background and qualifications of the pupil applying for admission as compared with other pupils previously assigned to the school in which admission is sought. It is the intention of the legislature to hereby delegate to the local school boards all necessary and proper administrative authority to prescribe such rules and regulations and to make such decisions and determinations as may be requisite for such purposes.

Section 3. a. The parent or guardian of any child, or the person standing in loco parentis to any child who shall apply to the appropriate public school official for the enrollment of any such child in any public school within the county in which such child resides, and whose application for such enrollment shall be denied may, pursuant to rules and regulations established by the county boards of public instruction, apply to such board for enrollment in such school and shall be entitled to a prompt and fair hearing by such board in accordance with the rules and regulations established by such board. The majority of such board shall be a quorum for the purpose of holding such hearing and passing upon such application and the decision of the majority of the members present at such hearing shall be the decision of the board. If at such hearing the board shall find that such child is entitled to be enrolled in such school or if the board shall find that the enrollment of such child in such school will be for the best interest of such child and will not interfere with the proper administration of the school or with the proper instruction of the pupils there enrolled and will not endanger the health or safety of the pupils there enrolled, the board shall direct that such child be enrolled in and admitted to such school. If the board finds that the child is not entitled to be enrolled in such school or that his enrollment in such school would not be for the best interest of the child or that his enrollment would seriously interfere with the proper administration of such school or with the proper instruction of the pupils there enrolled or that the child's admission to such school would endanger the health or safety of the children there enrolled, the board shall deny the petition for enrollment and direct the enrollment of the child in such other school in the county as shall be determined by the board to be best adapted or qualified to serve the best interests of the child and of the public school system.

b. If a parent or guardian of any child whose application for enrollment has been denied, or the person standing in loco parentis to any such child, shall be dissatisfied with the decision of any county board with respect to the school in which such child shall be enrolled, such parent or guardian, or such person standing in loco parentis to such child, may seek a review of such decision by making and filing with the State Board of Education within thirty (30) days after the rendition of such decision, an application for review thereof, and as soon as practicable, but not later than thirty (30) days after receiving such application, the State Board of Education shall cause the county school board, whose decision is sought to be reviewed, to transmit to it the transcript of the evidence in such case before them, and within said thirty (30) day period of time affirm, reverse or modify said decision or remand the matter to the county board for further proceedings, provided, however, that the State Board of Educa-

tion may, in its discretion, take or direct to be taken any additional evidence or testimony and may consider such additional testimony in connection with the original transcript, and shall affirm, reverse or modify the decision of the board of public instruction or remand the matter to the county board for further proceedings, and in all such proceedings, the county superintendent of public instruction and the board of public instruction of said county shall be notified and shall be considered as a party to the review.

In addition to the matters and things set forth herein to be considered by the county board of public instruction in the assignment of such pupil to a school, the State Board of Education may take into consideration any matter and thing which in its judgment and discretion relates to the welfare, safety, well-being, peace and tranquility of the community or area affected, and taking all such matters into consideration, shall render its decision, either reversing the action or actions theretofore taken as provided above or modifying the decision or decisions previously taken, or remand the matter to the county board of public instruction for further proceedings.

c. Any parent or guardian of any child or the person standing in loco parentis to any child, or a majority of the board of public instruction of any county affected by the decision of the State Board of Education, and who is dissatisfied therewith, may appeal such decision as a matter of right to the Circuit Court of Leon County, Florida, within thirty (30) days after the rendition of the said decision by the Board. The appeal shall be heard by the Circuit Court upon the record certified by the Board, which shall include a copy of the transcript of evidence, and such documents and exhibits as may have been filed before the Board, as either party may request. The Circuit Court may affirm, reverse, modify or remand the cause to the Board for further proceedings. An appeal from the decision of the Board to the Circuit Court shall be taken by filing a written notice with the Board. Said notice of appeal shall be served personally, or by mailing a true copy thereof by registered mail within five (5) days after the same is filed to the attorney of record for the interested parties. The notice shall fix the return date of the appeal. The appeal shall be returnable before the Circuit Court of Leon County to a date not less than thirty (30) days and not more than sixty (60) days from the date the decision appealed from is filed in the office of the Board. Except where it is inconsistent herewith, the statutes and rules governing appeals in chancery shall govern appeals provided for herein. In all such appeals the Board shall be the sole party respondent, and the Attorney General of the State of Florida shall be given notice of such appeal and shall take such action therein as he shall be directed by the Board.

d. In any proceeding brought pursuant to the provisions of this section the Attorney General of the State of Florida is authorized upon request to furnish representation to the County School Board, and to represent the State Board of Education of the State of Florida, as the case may be, and upon request shall furnish such services as may be necessary to properly present and defend the action of the public bodies and officials charged with the responsibility of administering the provisions of this chapter.

e. Reviews by the State Board of Education of the State of Florida of any decisions rendered by the County School Boards in the state shall be considered and construed as a step in the local proceeding.

Section 4. The county school boards of the public schools of Florida are authorized and empowered to conduct surveys within their respective counties to determine the attitudes and feelings of the citizens of their respective communities with the subsequent purpose of formulating plans to maintain, preserve and improve the public school system of Florida.

Section 5. The county school boards are authorized and empowered to create and appoint citizens committees and study groups from their localities to assist in the aforementioned surveys and plans.

Section 6. The county school boards shall be authorized to employ special counsel to assist the county school board's attorney in representing the board in any litigation involving rules and regulations and rulings and decisions of the board under the provisions of this act.

Section 7. If any section, subsection, sentence, clause, phrase or word of this Act is for any reason held or declared to be unconstitutional, invalid, inoperative, ineffective, inappli-

cable, or void, such invalidity or unconstitutionality shall not be construed to affect the portions of the Act not so held to be unconstitutional, void, invalid or ineffective, or affect the application of this Act to other circumstances not so held to be invalid, it being hereby declared to be the express legislative intent that any such unconstitutional, illegal, invalid, ineffective, inapplicable or void, portion or portions of this act did not induce its passage, and that without the inclusion of any such unconstitutional, illegal, invalid, ineffective or void portions of this act, the legislature would have enacted the valid and constitutional portions thereof.

Section 8. Section 230.23(6) (g), Florida Statutes, is hereby repealed.

Section 9. This act shall take effect immediately upon becoming a law.

Approved by the Governor July 26, 1956.

Filed in Office Secretary of the State July 27, 1956.

EDUCATION

Public Schools—Louisiana

Senate Bill No. 350 of the 1956 Regular Session of the Louisiana Legislature, approved by the Governor on July 13, 1956, applies to public schools in any city of the state having a population of more than 300,000. That bill requires the separate use of school buildings by white and Negro children and provides for the assignment of teachers on a racially separate basis. That bill follows:

AN ACT

To establish a method of classification of public school facilities in any city with a population in excess of Three Hundred Thousand (300,000), to provide for the exclusive use of school facilities therein by white and Negro children respectively, the mode of changing the classification of any schools therein, and to provide that white teachers shall teach only white children and Negro teachers shall teach only Negro children.

Be it enacted by the Legislature of the State of Louisiana:

Section I. Those public schools in any city in Louisiana with a population in excess of Three Hundred Thousand (300,000) presently being utilized in the education of children of the white race through the twelfth grade of school shall from the effective date of this statute be utilized solely and exclusively in the education of children of the white race, unless otherwise classified by the Legislature as provided in Section III and IV hereof.

Section II. Those public schools in such cities presently being utilized in the education of children of the Negro race through the twelfth grade of school shall from the effective date of this statute be utilized solely and exclusively in the education of children of the Negro race unless otherwise classified by the Legislature as provided in Sections III and IV hereof.

Section III. From and after the effective date of this statute, such new public schools as are erected or instituted in any city with a population in excess of Three Hundred Thousand (300,000) shall be classified as white or Negro schools by the Special School Classification Committee of the Louisiana Legislature, provided for in Section IV hereof.

Section IV. The President of the Senate shall appoint two (2) members from that body, and the Speaker of the House shall appoint two (2) members from the House of Representatives who shall serve as the Special School Classification Committee of the Louisiana Legislature, which Committee shall have the power and authority to classify any new public schools erected or instituted, or to re-classify any existing public school, in any city covered by the other provisions of this Act, so as to designate the same for the exclusive use of children of the white race or for the exclusive use of children of the Negro race. Any such classification or re-classification shall be subject to confirmation by the Legislature of Louisiana at its next regular session, said confirmation to be accomplished by concurrent resolution of the two houses of the

Legislature. It is clearly understood that the Legislature of the State of Louisiana reserves to itself the sole power to classify or to change the classification of such public schools from all white to any other classification, or from all Negro to any other classification, and the action of the Special School Classification Committee as recited hereinabove shall not become final until properly ratified by the Legislature.

Section V. Only white teachers shall teach white children in public schools; and only Negro teachers shall teach Negro children in public schools.

Section VI. Any suit contesting any of the provisions of this Act may be brought only against the State of Louisiana with the consent of the Louisiana Legislature first obtained, as provided by the Constitution of the State of Louisiana, and no State, Parish or Municipal Board, Agent or Officer shall have any right or authority to sue or be sued or to stand in judgment on any questions affecting the validity of this Act or any of its provisions.

Section VII. That if any one or more sections, provisions or clauses of this Act shall be held to be unconstitutional or ineffective for any reason, the remainder hereof shall remain in full force and effect.

Section VIII. All laws or parts of laws in conflict herewith, particularly Section 321 of Title 17 of the Revised Statutes of 1950 are hereby repealed.

EDUCATION

Public Schools—North Carolina

Chapter 1, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, proposes an amendment to the North Carolina constitution to provide for educational expense grants (see ch. 3, p. 930) and local option as to the continuance of public schools (see ch. 4, p. 934). That act follows:

CHAPTER 1

AN ACT to amend article IX of the constitution of North Carolina so as to authorize education expense grants and to authorize local option to suspend operation of public schools.

The General Assembly of North Carolina do enact:

Section 1. Article IX of the Constitution of North Carolina is hereby amended by adding a Section 12 which shall read as follows:

"§ 12. Education expense grants and local option. Notwithstanding any other provision of this Constitution, the General Assembly may provide for payment of education expense grants from any State or local public funds for the private education of any child for whom no public school is available or for the private education of a child who is assigned against the wishes of his parent, or the person having control of such child, to a public school attended by a child of another race. A grant shall be available only for education in a nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, a grant shall, in addition, be available only when it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race.

"Nothwithstanding any other provision of this Constitution, the General Assembly may provide for a uniform system of local option whereby any local option unit, as defined by the General Assembly, may choose by a majority vote of the qualified voters in the unit who vote on the question to suspend or to authorize the suspension of the operation of one or more or all of the public schools in that unit.

"No action taken pursuant to the authority of this Section shall in any manner affect the obligation of the State or any political subdivision or agency thereof with respect to any indebtedness heretofore or hereafter created."

Section 2. This amendment shall be submitted to the qualified voters of the State at

the next general election, which shall be conducted under the laws now governing general elections in this State, or under such laws as may be provided by the General Assembly.

Section 3. In such election the electors favoring the amendment set out in Section 1 of this Act shall vote ballots on which shall be printed or written the words, "FOR constitutional amendment authorizing education expense grants for private education and authorizing local vote to suspend local schools," and those opposed shall vote ballots on which shall be printed or written the words, "AGAINST constitutional amendment authorizing education expense grants for private education and authorizing local vote to suspend local schools."

Section 4. If a majority of the votes cast be in favor of this amendment, it shall be the duty of the Governor of the State to certify the amendment under the Seal of the State to the Secretary of State, who shall enroll said amendment so certified among the permanent records of his office, and the amendment so certified shall be in full force and effect from and after the date of certification.

Section 5. All laws and clauses of laws in conflict with the provisions of this Act are hereby repealed.

Section 6. This Act shall be effective upon its ratification.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 2, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, provides for an election to consider the adoption of several constitutional amendments (see p. 928). That act follows:

CHAPTER 2

AN ACT to provide for a general election on September 8, 1956.

The General Assembly of North Carolina do enact:

Section 1. A general election shall be held on Saturday, September 8, 1956, at which election the voters of the State shall vote on adoption of amendments to the Constitution of North Carolina.

Section 2. At the general election provided for in Section 1 of this Act, the only questions to be submitted to the voters shall be the adoption of amendments to the Constitution of the State. The State Board of Elections shall cause to be printed and distributed ballots which are to be used in said election, which ballots shall bear a facsimile of the signature of the Chairman of the State Board of Elections and shall be in substantially the following form:

OFFICIAL BALLOT

SPECIAL SESSION SCHOOL AMENDMENT

☐ FOR constitutional amendment authorizing education expense grants for private education and authorizing local vote to suspend local schools.

☐ AGAINST constitutional amendment authorizing education expense grants for private education and authorizing local vote to suspend local schools.

REGULAR SESSION AMENDMENTS

[*Omitted*]

Section 3. Nothing in this Act is to be construed to prohibit the use of voting machines in accordance with the laws of the State.

Section 4. The State of North Carolina shall reimburse the counties of the State for all necessary expenses incurred in holding said election, the same to be paid out of the Contingency and Emergency Fund.

Section 5. For purposes of the election provided in this Act, the registration books shall be opened for the registration of voters on the fourth Saturday before the day of the election. The registration books shall be closed on the second Saturday before the day of the election. The Saturday immediately preceding the day of

the election shall be challenge day. Except as otherwise provided in this Act, the election shall be held in accordance with the laws governing other general elections.

Section 6. The results of the election shall be canvassed and declared by the county boards of elections, who shall meet not later than Wednesday, September 12, 1956 and certify to the State Board of Elections the results of said election in each respective county. As soon as possible thereafter, the State Board of Elections shall meet at the call of the chairman to certify the results of the election to the Governor of the State.

Section 7. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 8. This Act shall be effective upon its ratification.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 3, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, makes provision for the granting of state funds as "education expense grants" to children who may be assigned to attend a public school attended by members of another race and to which assignment the parents or guardian of the child object. The grants are to be available only for instruction in private nonsectarian schools. That act follows:

CHAPTER 3

AN ACT to provide for education expense grants for children attending non-public school.

The General Assembly of North Carolina do enact:

Section 1. Chapter 115 of the General Statutes relating to public education is hereby amended by adding a new article, to be designated Article 35, as follows:

"ARTICLE 35

"Education Expense Grants

Section 1. Statement of legislative policy and purposes. The General Assembly of North Carolina recognizes and hereby affirms that knowledge, morality, and adherence to fundamental principles of individual freedom and responsibility are necessary to good government and the happiness of mankind; and further affirms that schools and the means of education ought forever to be encouraged. The value and importance of our public schools are known and acknowledged by our people. It is further recognized that our public schools are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. Our people need to be assured that no child will be forced to attend a school with children of another race in order to get an education. It is the purpose of the State of North Carolina to make available, under the conditions and qualifications set out in this Act, education expense grants for the private education of any child of any race residing in this State. In so doing, it is the hope of the General Assembly of North Carolina that all peoples within our State shall respect deeply-felt convictions, and that our public school system shall be continually strengthened and improved, and sustained by the support of all our citizens.

Section 2. Every child residing in this State for whom no public school is available, or who is assigned to a public school attended by a child of another race against the wishes of his parent or guardian or the person standing in loco parentis to such child, is entitled to apply for an education expense grant from State funds appropriated for that purpose. Such grants shall be available only for education in a private nonsectarian school, and in the case of a child assigned to a public school attended by a child of another race, shall, in addition, be available when it is not reasonable and practicable to

reassign such child to a public school not attended by a child of another race. For purposes of this Article, a nonsectarian school is defined as a school whose operation is not controlled directly or indirectly by any church or sectarian body or by any individual or individuals acting on behalf of a church or sectarian body.

Section 3. It shall be the policy of the State to make an education expense grant available to each eligible child, as provided under this Article, which is equal to the per-day, per-student amount of State funds expended on public schools throughout the State during the preceding school year, but in no event, shall a grant for any child exceed the amount actually expended for the private education of such child. The State Board of Education shall determine the maximum amount of the grant to be made available to each child, and in so doing, shall take into account the total expenditures for all current expenses and for debt service on State school bonds made from State funds for the preceding school year.

Section 4. Application for an education expense grant shall be made to the board of education of the administrative unit within which the child resides. Such application shall be on standard forms prescribed by the State Board of Education for that purpose and shall be signed under oath or affirmation by the parent or guardian of or the person standing in loco parentis to the child for whom application is made.

Section 5. Application for an education expense grant shall be approved if the board of education to whom application is made finds that:

(a) the child for whom application is made resides within the administrative unit; and

(b) there is no public school available for such child, or such child is now assigned against the wishes of his parent or guardian or of the person standing in loco parentis to such child to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and

(c) such child is enrolled in or has been accepted for enrollment in a private nonsectarian school, recognized and approved under Article 32 of this Chapter.

Section 6. Each application for an education expense grant shall specify the number of school days for which the grant is requested, but in no event shall any one application be for more than one school year or the equivalent of one hundred and eighty (180) school days. If the conditions of Section 5 of this Article continue to be met, application may be filed on behalf of a child, who has received benefits under a previous application, for another school year or part thereof.

Section 7. Upon approving the application for an education expense grant from State funds, the board of education shall give notice in writing to the parent or guardian or person standing in loco parentis to the child concerned of an education grant commitment for a specified number of school days and for a specified amount for each school day, but no one commitment shall exceed one hundred and eighty (180) school days. So long as the requirements set out in paragraphs (a) and (c) of Section 5 of this Article are met during the period of the education grant commitment, the board, unless requested otherwise by the parent or guardian or person standing in loco parentis, shall continue payments under such commitment notwithstanding the fact that a change of conditions since approval of the application may make it reasonable and practicable to assign such child to a public school not attended by a child of another race.

Section 8. Upon disapproval of an application for an education expense grant, whether payable from State or local funds, the board of education shall give notice to the applicant by registered mail, and any applicant may within ten (10) days after receipt of such notice apply to such board for a hearing, and shall be given a prompt and fair hearing on the question of entitlement to an education expense grant. The board

shall render prompt decision upon such hearing, and if the board shall affirm its previous action of disapproval of the application, notice shall be given to the applicant by registered mail, and any applicant aggrieved by the action of the board may within ten (10) days after receipt of such notice file a petition in the superior court of the county in which the board sits for a hearing in the matter on all questions of fact and of law. Notice of the petition shall be properly served upon the board of education. The board shall have fifteen (15) days after receipt of notice of the petition within which to prepare and furnish to the petitioner or his attorney a certified transcript of the record in the case for filing in the superior court, which record shall include a copy of the application and any official orders and rulings of the board in the case. Additional time for preparation of the record may be granted to the board, for good cause, upon motion before the clerk of the superior court. The petition in the superior court may be heard by the resident judge of the district or by the judge presiding at a term of court in that district, and such judge shall have authority to take testimony and examine into the fact of the case, and to determine all questions of fact and of law, and enter judgment thereon. From the judgment of the superior court an appeal may be taken by the petitioner or the board to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.

Section 9. Payments of education expense grants shall be made by check upon receipt of satisfactory evidence that the child for whom payment is made actually attended a private nonsectarian school, recognized and approved under Article 32 of this Chapter. The school attended shall furnish, upon forms prescribed by the State Board of Education, a sworn certificate signed by the director or other appropriate official of the school, showing the number of school days actually attended by the child for whom payment is made. A child is deemed to be in attendance, within the meaning of this Section, although temporarily absent due to illness or other good cause, so long as such child is enrolled in the school as a bona fide student. Checks in payment of education expense grants shall be made payable jointly to the parent or guardian of or the person standing in loco parentis to the child and the school which the child attended, and shall be mailed to the parent or guardian or person standing in loco parentis for endorsement; provided, that if the school attended shall indicate in its certificate that the tuition and expenses for such child have already been paid the check shall be made payable to the parent or guardian or person standing in loco parentis alone.

Section 10. Payments of education expense grants shall be made by each board of education monthly, bi-monthly or quarterly in accordance with uniform regulations adopted and promulgated by the State Board of Education. The State Board of Education is authorized and directed to prescribe standard forms for application for grants, for notice of education grant commitment, for certificates of attendance, and such other forms as may be necessary or desirable in the administration of the provisions of this Article. The State Board of Education shall have general supervision and administration of the funds provided by the General Assembly for education expense grants, and it is intended that such funds shall be managed and allotted by the Controller of the State Board of Education, under direction of the Board, pursuant to the revelant provisions of Chapter 115 of the General Statutes governing administration of fiscal affairs of the Board.

Section 11. Payments of individual education expense grants from State funds shall be made only by warrants drawn on the State Treasurer, signed by the chairman and the secretary of the county or city board of education. The fiscal procedures prescribed in other Articles of this Chapter, unless in conflict with some specific provision in this Article, shall apply to the handling and management of State funds appropriated for education expense grants.

Section 12.. No education expense grant shall be paid for any child except for attendance at a private nonsectarian school found to be in compliance with the provisions of Article 32 of this Chapter. It shall be the

duty of the State Board of Education to maintain a current list of all such approved schools and to furnish such information from time to time to county and city boards of education. Payment of education expense grants for or on behalf of any child attending such a school shall not vest in the State of North Carolina, the State Board of Education or any agency or political subdivision of the State any supervision or control whatever over such non-public schools or any responsiblity whatever for their conduct and operation.

Section 13. The appropriate tax levying authorities for any administrative unit may, upon recommendation of the board of education of such unit, appropriate amounts from any local tax or non-tax funds for a local education expense grant. In no event, shall the combined total of grants for any one child, from both State and local funds, exceed the amount of actual expenses incurred in the private education of such child.

Section 14. Application for a local education expense grant shall be filed with the board of education of the administrative unit when local funds have been appropriated or allotted for such purpose. No child shall be entitled to a local education expense grant who is not at the same time eligible, under the provisions of this Article, for a grant from State funds.

Section 15. Each application for a local education expense grant shall specify the number of school days for which the grant is requested, but in no event shall any one application be granted for more than one school year or the equivalent of one hundred and eighty (180) school days. If the child who has received benefits under a previous application continues to be otherwise eligible, an application for a local education expense grant for another school year or part thereof may be filed in his behalf.

Section 16. Payments of local education expense grants shall be made by check upon receipt of satisfactory evidence that the child for whom payment is made actually attended a private nonsectarian school recognized and approved under Article 32 of this Chapter. The school attended shall furnish, in such form as may be prescribed by the local board of education, a sworn certificate signed by the director or other appropriate official of the school, showing the number of school days actually attended by the child for whom payment is made. A child is deemed to be in attendance, within the meaning of this Section, although temporarily absent due to illness or other good cause, so long as such child is enrolled in such school as a bona fide student. Checks in payment of local education expense grants shall be made payable jointly to the parent or guardian of or the person standing in loco parentis to the child and the school which the child attended, and shall be mailed to the parent or guardian or person standing in loco parentis for endorsement; provided, that if the school attended shall indicate in its certificate that the tuition and expenses for such child have already been paid the check shall be made payable to the parent or guardian or person standing in loco parentis alone.

Section 17. Payments of local education expense grants shall be made by each board of education monthly, bi-monthly or quarterly in accordance with rules and regulations adopted by each local board. In administering local grant payments, each board shall, so far as practicable, follow the procedures prescribed by the State Board of Education for the payment of education expense grants from State funds.

Section 18. All local funds for education expense grants, from whatever source provided, shall be managed, supervised and disbursed in accordance with the procedures set out in other Articles of this Chapter, pertaining to administration of local school funds, except where such procedures are in conflict with some provision of this Article.

Section 19. No local education expense grant shall be paid for or on behalf of any child except for attendance at a private nonsectarian school found to be in compliance with the provisions of Article 32 of this Chapter.

Section 20. Any person who shall knowingly make any false affidavit or shall knowingly swear or affirm falsely to any matter or thing required by the terms of this Article to be sworn or affirmed to shall be guilty of perjury, and upon conviction shall be punishable by a fine and imprisonment as other persons committing perjury are punishable.

Section 21. It shall be unlawful for any parent or guardian or the person standing in loco parentis to a child to accept any payment authorized by this Article knowing that the child for whose benefit the payment is received did not actually attend, or was not actually a bona fide student at, a private nonsectarian school during the period for which payment is received. Any person violating this Section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five (5) years or by a fine of not more than five thousand dollars ($5,000.00) or by both such fine and imprisonment.

Section 22. It shall be unlawful for any official or employee of any school, acting wilfully or corruptly, to receive any payment of a grant authorized by this Article, knowing that said school is not entitled to such payment. Any person violating this Section shall be guilty of a felony and upon conviction shall be punished by imprisonment in the State's prison for not more than five (5) years or by a fine of not more than five thousand dollars ($5,000.00) or by both such fine and imprisonment."

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall be in full force and effect from and after the date that the proposed constitutional amendment, authorizing education expense grants and authorizing local option to suspend operation of public schools, shall become effective.

In the General Assembly read three times and ratified this the 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 4, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, provides for local option to be exercised as to whether to continue to operate public schools within local school districts. That act follows:

CHAPTER 4

AN ACT to provide for a local option to suspend operation of public schools.

The General Assembly of North Carolina do enact:

Section 1. Chapter 115 of the General Statutes relating to public education is hereby amended by adding a new article, to be designated Article 34, as follows:

"ARTICLE 34

"Local Option

Section 1. Statement of legislative policy and purposes. The General Assembly of North Carolina recognizes and hereby affirms that knowledge, morality, and adherence to fundamental principles of individual freedom and responsibility are necessary to good government and the happiness of mankind; and further affirms that schools and the means of education ought forever to be encouraged. The value and importance of our public schools are known and acknowledged by all our people. It is further recognized that our public schools are so intimately related to the customs and feelings of the people of each community that their effective operation is impossible except in conformity with community attitudes. Our people in each community need to have a full and meaningful choice as to whether a public school, which may have some enforced mixing of the races, shall continue to be maintained and supported in that community. It is the purpose of this Act to provide orderly procedures, consistent with

law, for the effective expression of such choice. In so doing, it is the hope of the General Assembly of North Carolina that all peoples within our State shall respect deeply-felt convictions, and that our public school system shall be continually strengthened, improved, and sustained by the support of all our citizens.

Section 2. Definitions of words and phrases. The following words and phrases when used in this Article shall, for the purpose of this Article, have the meanings respectively prescribed to them in this Section, except in those instances where the context clearly indicates a different meaning:

(a) Board of Education. The board of education for any county or city school administrative unit.

(b) Local Option Unit. Any county or city school administrative unit, or the combination of two or more administrative units in whole or in part, or any convenient and reasonable territorial subdivision within an administrative unit which includes within its boundaries one or more public schools.

(c) Types of Public Schools. For purposes of this Article the different types of public schools are as follows:

(1) An elementary school, that is, a school which embraces part or all of the eight elementary grades, including the elementary portion of a union school.

(2) A high school, that is, a school which embraces a high school department above the elementary grades and which offers at least the minimum high school course of study prescribed by the State Board of Education, including the high school portion of a union school.

(3) A union school, that is, a school which embraces a part or all of the elementary and high school grades.

(4) A junior high school, that is, a school which embraces not more than the first year of high school with not more than the upper two elementary grades.

(5) A senior high school, that is, a school which embraces the tenth, eleventh and twelfth grades.

Section 3. The board of education of any administrative unit may, pursuant to the provisions of this Article, suspend the operation of one or more or all of the public schools under its jurisdiction. For purposes of this Article, each county and city school administrative unit as defined in Section 4, Article 1 of this Chapter shall constitute a local option unit; provided, however the board of education of any administrative unit may in lieu thereof, and from time to time, subdivide the administrative unit into two or more local option units; and provided further, two or more administrative units, in whole or in part, may by agreement of each respective board of education constitute a local option unit and in such case all action with respect to such local option unit shall be taken by a majority of the members of each board of education concerned. One or more public schools shall be included within the territorial boundaries of each local option unit established by the board of education; provided, that two or more types of schools may within the discretion of the board of education be included in such local option unit.

Section 4. Two or more different and distinct local option units having the same or overlapping territorial boundaries may be established within an administrative unit by the board of education of the administrative unit. A specific public school shall be included in only one local option unit at any given time, but the elementary division of a union school or junior high school may be in one local option unit and the high school division of the same union school or junior high school may be in a different local option unit at the same time.

Section 5. Any board of education may at any time, by resolution of a majority of the members, call all for an election on the question of closing the public schools within a local option unit which is under that board's jurisdiction; provided, that an election shall be called by the board when a petition signed by at least fifteen per cent

(15%) of the registered voters residing within the local option unit is presented to the board requesting such an election. When a majority of the votes cast in such election are in favor of suspending the operation of the schools in such local option unit, the board of education shall suspend the operation of such public schools. Such suspension shall be accomplished in an orderly manner and the board of education shall take all steps necessary to preserve and protect school property during and after such closing. Any child living within a local option unit who could attend a public school in such local option unit except for the fact that operation of such school has been suspended under provisions of this Article shall not be entitled as a matter of right to attend any other public school, but in lieu thereof shall be entitled to an education expense grant pursuant to the provisions of Article 35 of this Chapter.

Section 6. Any board of education may at any time, by resolution of a majority of the members, call for an election on the question of reopening the public schools within a local option unit which is under that board's jurisdiction; provided, that an election shall be called by the board when a petition signed by at least fifteen per cent (15%) of the registered voters residing within the local option unit is presented to the board requesting such an election. When a majority of the votes cast in such election shall be in favor of reopening the public schools in that local option unit, the board of education shall immediately proceed to take all steps necessary to accomplish such reopening at the earliest practicable date.

Section 7. When, for the same school year, there has been an election on the question of suspending the operation of the public schools of a local option unit, and a petition requesting another election of the same question is presented to the board of education, the board of education is not required to call a second election on that question, but may do so in its discretion. When, for the same school year, there has been an election on the question of reopening the public schools of a local option unit, and a petition requesting another election on the same question is presented to the board of education, the board of education is not required to call a second election on that question, but may do so in its discretion.

Section 8. When by resolution of a majority of its members a board of education has called any election authorized or required by this Article, a certified copy of such resolution shall thereupon be furnished to the county board of elections, or in the case of a local option unit which is located in more than one county to the board of elections of each county concerned, with each board having the authority and responsibility to call and conduct the election in its respective county. Within five (5) days after receipt of such resolution, the county board of elections shall give the first formal notice of such election. Notice of call of an election shall be given by the county board of elections at least once a week for four (4) successive weeks in some newspaper published or generally circulated in the territory, but when no newspaper is published or generally circulated in the territory so as to meet this requirement, it shall be sufficient to post notice of the election call at the courthouse of the county in which the election is to be held and at each public school involved in the election, for a period of at least thirty (30) days before the election. Notice of the election call shall contain the date on which the election is to be held, and shall contain adequate and full information as to which specific school or schools are involved in the election, as well as a clear designation of the area within which the qualified voters are entitled to vote in such election.

Section 9. In any election held under this Article, the county board of elections shall designate the polling place or places, appoint the registrars and judges of election, canvass and determine the results of said election when the returns have been filed with them by the officers holding the election, and record such determination on their records. Except as otherwise provided in this Article, such election shall be held in accordance with the laws governing general elections.

Section 10. A new registration of the

qualified voters of the territory concerned in an election held under this Article may be ordered in the discretion of the county board of elections. In addition, the county board of elections, in its discretion, may order a separate registration of the qualified voters within the territory, with separate books of registration to be established and maintained for purposes of elections under this Article; and in such event, registration for any election other than one provided for in this Article shall not constitute registration for an election under this Article, and registration for an election under this Article shall not constitute registration for any election not provided for in this Article. Notice of registration for an election under this Article shall be deemed to be sufficiently given by publication once in some newspaper published or generally circulated in the territory, at least twenty (20) days before the close of the registration books. The published notice of registration shall state the days on which the books will be open for registration of voters and the place or places at which the books will be open on Saturdays. Registration shall close on the second Saturday before the election, and the Saturday before the election shall be challenge day. The expense of holding and conducting any election held under this Article shall be borne by the board of education of the administrative unit in which the election is held. When the results of any such election have been officially determined and recorded in the minutes of the county board of elections, the validity of such election or of the registration for such election shall not be open to question except in an action or proceeding commenced within thirty (30) days after the determination of the results of such election.

Section 11. In an election under this Article on the question of suspending the operation of a public school or schools, the ballots to be used in such election shall have printed thereon the words 'FOR suspending the operation of . . . [naming the specific public schools]' and 'AGAINST suspending the operation of . . . [naming the specific public schools]'; provided, however, that if the local option unit concerned shall include all the public schools within an administrative unit, the board of elections may in lieu of the wording of the ballots prescribed above have printed thereon the word 'FOR suspending the operation of all the public schools in . . . [naming the administrative unit]' and 'AGAINST suspending the operation of all the public schools in . . . [naming the administrative unit].' In an election on the question of reopening a public school or schools which have previously been closed, the ballots to be used in such election shall contain the same language as indicated above, except the word 'resuming' shall be used in lieu of the word 'suspending'. Nothing in this Article shall be construed to prohibit the use of voting machines in accordance with the laws of this State.

Section 12. When the operation of any public school is suspended pursuant to this Article, any principal, teacher or supervisor then under contract and affected by such suspension shall continue to receive all salaries and benefits provided under such contract for the term of the contract. When any such principal, teacher or supervisor has secured suitable and adequate employment prior to the expiration of the contract term, such contract shall thereupon be terminated and all salaries and benefits provided thereunder shall cease. The suspension of any school pursuant to this Article shall not affect the current contract of the superintendent of any county or city administrative unit.

Section 13. No action taken pursuant to the provisions of this Article shall affect the obligation of the State or any political subdivision or agency thereof with respect to any indebtedness heretofore or hereafter created."

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall be in full force and effect from and after the date that the proposed constitutional amendment, authorizing education expense grants and authorizing local option to suspend operation of public schools, shall become effective.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 5, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, makes amendments to the compulsory school attendance law so as to make provision for the granting of "education expense grants" (see p. 930). That act follows:

CHAPTER 5

AN ACT to amend G. S. 115-166 relating to compulsory school attendance.

The General Assembly of North Carolina do enact:

Section 1. The first sentence of G. S. 115-166 is hereby amended to read as follows: "Every parent, guardian or other person in this State having charge or control of a child between the ages of seven and sixteen years shall cause such child to attend school continuously for a period equal to the time which the public school to which the child is assigned and in which he is enrolled shall be in session; provided, this requirement shall not apply with respect to any child when the board of education of the administrative unit in which the child resides finds that: (a) such child is now assigned against the wishes of his parent or guardian, or person standing in loco parentis to such child, to a public school attended by a child of another race and it is not reasonable and practicable to reassign such child to a public school not attended by a child of another race; and (b) it is not reasonable and practicable for such child to attend a private non-sectarian school, as defined in Article 35 of this Chapter."

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall be in full force and effect from and after the date the proposed constitutional amendment, authorizing education expense grants and authorizing local option to suspend operation of public schools, shall become effective.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 6, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, makes provision for funds to implement the "education expense grants" authorized by Chapter 3, p. 930. That act follows:

CHAPTER 6

AN ACT to provide funds for education expense grants and for the administration of the education expense grant law.

The General Assembly of North Carolina do enact:

Section 1. For the fiscal year 1956-1957 there shall, from time to time, be allocated to the State Board of Education from the Contingency and Emergency Fund such amounts as are necessary for education expense grants in accordance with Article 35, Chapter 115 of the North Carolina General Statutes, and such amounts as are necessary for the administration of said Article.

Section 2. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 3. This Act shall be in full force and effect from and after the date the proposed constitutional amendment, authorizing education expense grants and authorizing local option to suspend operation of public schools, shall become effective.

In the General Assembly read three times and ratified, this 27th day of July, 1956.

EDUCATION

Public Schools—North Carolina

Chapter 7, 1956 Extra Session Laws of the General Assembly of North Carolina, enacted July 27, 1956, makes amendments in the "School Placement Law" (see 1 Race Rel. L. Rep. 240). That act follows:

CHAPTER 7

AN ACT to amend Article 21, Chapter 115 of the general statutes, relating to assignment and enrollment of pupils in public schools.

The General Assembly of North Carolina do enact:

Section 1. G. S. 115-176 is hereby amended to read as follows: "Each county and city board of education is hereby authorized and directed to provide for the assignment to a public school of each child residing within the administration unit who is qualified under the laws of this State for admission to a public school. Except as otherwise provided in this Article, the authority of each board of education in the matter of assignment of children to the public schools shall be full and complete, and its decision as to the assignment of any child to any school shall be final. A child residing in one administrative unit may be assigned either with or without the payment of tuition to a public school located in another administrative unit upon such terms and conditions as may be agreed in writing between the boards of education of the administrative units involved and entered upon the official records of such boards. No child shall be enrolled in or permitted to attend any public school other than the public school to which the child has been assigned by the appropriate board of education. In exercising the authority conferred by this Section, each county and city board of education shall make assignments of pupils to public schools so as to provide for the orderly and efficient administration of the public schools, and provide for the effective instruction, health, safety, and general welfare of the pupils. Each board of education may adopt such reasonable rules and regulations as in the opinion of the board are necessary in the administration of this Article."

Section 2. G. S. 115-117 is hereby amended to read as follows: "In exercising the authority conferred by §115-176, each county or city board of education may, in making assignments of pupils, give individual written notice of assignment, on each pupil's report card or by written notice by any other feasible means, to the parent or guardian of each child or the person standing in loco parentis to the child, or may give notice of assignment of groups or categories of pupils by publication at least two times in some newspaper having general circulation in the administrative unit."

Section 3. G. S. 115-178 is hereby amended to read as follows: "The parent or guardian of any child, or the person standing in loco parentis to any child, who is dissatisfied with the assignment made by a board of education may, within ten (10) days after notification of the assignment, or the last publication thereof, apply in writing to the board of education for the reassignment of the child to a different public school. Application for reassignment shall be made on forms prescribed by the board of education pursuant to rules and regulations adopted by the board of education. If the application for reassignment is disapproved, the board of education shall give notice to the applicant by registered mail, and the applicant may within five (5) days after receipt of such notice apply to the board for a hearing, and shall be entitled to a prompt and fair hearing on the question of reassignment of such child to a different school. A majority of the board shall be a quorum for the purpose of holding such hearing and passing upon application for reassignment, and the decision of a majority of the members present at the hearing shall be the decision of the board. If, at the hearing, the board shall find that the child is entitled to be reassigned to such school, or if the board shall find that the reassignment of the child to such school will be for the best interests of the child, and will not interfere with the proper administration of the school, or with the proper instruction of the pupils there enrolled, and will not endanger the health or safety of the children there enrolled, the board shall direct that the child be reassigned to and admitted to such school. The board shall render

prompt decision upon the hearing, and notice of the decision shall be given to the applicant by registered mail."

Section 4. All laws and clauses of laws in conflict with this Act are hereby repealed.

Section 5. This Act shall be effective upon its ratification.

In the General Assembly read three times and ratified, this the 27th day of July, 1956.

EDUCATION
Public Schools—Virginia

On August 6, 1956, the Board of Supervisors of Loudoun County, Virginia adopted a resolution to suspend the furnishing of funds to any school of the county which is ordered to be integrated. That resolution follows:

IN RE: INTEGRATION
PUBLIC SCHOOLS:

Stirling M. Harrison, as President of the local chapter of the Defenders of State Sovereignty and Individual Liberties, presented and read a proposed resolution with reference to the imposition of integration of the public school system of Loudoun County.

Lucas D. Phillips, Campbell Legard, Roland Legard, J. M. Hughes, in addition to Mr. Harrison, spoke in favor of the resolution. Other members of the local chapter were present at this same time. No one spoke against this resolution.

On motion of Dr. Frazer and seconded by Mr. Phillips, the Board unanimously adopted the following resolution in the same words as presented by Mr. Harrison:

WHEREAS, it is the opinion of the Board of Supervisors of Loudoun County, Virginia, that the imposition of integration on the public school system of Loudoun County would be extremely detrimental to the interests of the people of the county and disastrous to the public school system therein, as well as in contravention of Article IX of the Constitution of Virginia, which specifically prohibits teaching white and colored children in the same school; and;

WHEREAS, in justifiable anticipation of the School Board of Loudoun County being requested to integrate the schools of Loudoun County, the Board of Supervisors deem it their duty to take a position relative to the use of public funds for integrated schools;

NOW, THEREFORE, be it resolved that in the event the integration edict is imposed upon the public school system of Loudoun County, Virginia, thereafter there will not be forthcoming as a result of the action of this board any funds for the maintenance and operation of any school ordered to be integrated in the County of Loudoun.

EDUCATION
Teachers—Florida

Chapter 31391 (Senate Bill No. 12-XX) of the session laws of Florida enacted by the 1956 Special Session of the Florida Legislature, approved August 1, 1956, provides for the selection and dismissal of teachers by public school officials without regard to prior contractual relationship. That act follows:

CHAPTER 31391
SENATE BILL NO. 12-XX

AN ACT relating to public school personnel, amending Subsection (2) of Section 231.36, Florida Statutes, as enacted by Section 1, Chapter 29890, Acts of 1955, authorizing the County Board of Public Instruction to choose school personnel from all available personnel and certificated teachers when said Board is required to or does consolidate its school program at any school center and to dismiss any

teacher or teachers not needed without regard to any previous contractual relationship; providing that the decision of said Board shall be final and providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (2) of section 231.36, Florida Statutes, being section 1 of chapter 29890, acts 1955, is amended to read:

231.36 *Contracts with instructional staff and with professional administrative assistants.*—

(2) Should the county board of public instruction have to choose from among its personnel who are on continuing contracts as to which should be retained, among the criteria to be considered shall be educational qualifications, efficiency, compatibility, character, and capacity to meet the educational needs of the community. Whenever a county board is required to or does consolidate its school program at any given school center by bringing together pupils theretofore assigned to separated schools, the county board may determine on the basis of the foregoing criteria from its own personnel, and any other certificated teachers, which teachers shall be employed for service at this school center, and any teacher no longer needed may be dismissed. The decision of the board shall not be controlled by any previous contractual relationship. In the evaluation of these factors the decision of the county board of public instruction shall be final.

Section 2. It is declared to be the legislative intent that if any section, subsection, sentence, clause, or provision of this act is held invalid, the remainder of the act shall not be affected.

Section 3. This act shall become effective immediately upon becoming a law.

Approved by the Governor August 1, 1956.

Filed in Office Secretary of the State August 1, 1956.

EDUCATION

Teachers—Louisiana

Act No. 249 of the 1956 Regular Session of the Louisiana Legislature, approved July 8, 1956, provides for additional causes for the removal of permanent teachers in the public school system. Those causes include membership in any organization prohibited from operating in the state by injunction (see *Louisiana ex. rel. Le Blanc v. Lewis*, 1 Race Rel. L. Rep. 571) or law or the advocacy of integration of the races in the public schools or institutions of higher learning. That act follows:

AN ACT

To amend and re-enact Section 443 of Title 17 of the Louisiana Revised Statutes of 1950, relative to removal of teachers; procedures; right to appeal; by adding thereto as causes for removal membership in or contribution to groups, organizations, movements or corporations prohibited from operating in the State of Louisiana, or advocacy of integration of the races in the state's school system or higher educational institutions.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 443 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 443. Removal of teachers; procedure; right to appeal

A permanent teacher shall not be removed from office except upon written and signed charges of wilful neglect of duty, or incompetency or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and then only if found guilty after a hearing by the school board of the parish or city, as the case may be, which hearing may be private or public, at the option of the teacher. At least fifteen days in advance of the date of the hearing, the school board shall furnish the teacher with a copy of the

written charges. The teacher shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at the said hearing. Nothing herein contained shall impair the right of appeal to a court of competent jurisdiction.

If a permanent teacher is found guilty by a school board, after due and legal hearing as provided herein, on charges of wilful neglect of duty, or of incompetency, or dishonesty, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about integration of the races within the public school system of the State of Louisiana, and ordered removed from office, or disciplined by the board, the teacher may, not more than one year from the date of the said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the manner. If the finding of the school board is reversed by the court and the teacher is ordered reinstated and restored to duty, the teacher shall be entitled to full pay for any loss of time or salary he or she may have sustained by reason of the action of the said school board.

Section 2. In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect.

Section 3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION

Teachers—Louisiana

Act No. 252 of the 1956 Regular Session of the Louisiana Legislature, approved July 8, 1956, provides for additional causes for removal of permanent teachers in the public school system of Orleans Parish of the state. Those causes include membership in any organization which is prohibited from operating in the state by law or injunction or advocacy of racial integration in the public schools or institutions of higher learning. That act follows:

AN ACT

To amend and re-enact Section 462 of Title 17 of the Louisiana Revised Statutes of 1950, relative to permanent teachers; causes for removal and procedure; by adding thereto as causes for removal membership in or contribution to groups, organizations, movements or corporations prohibited from operating in the State of Louisiana, or advocacy of integration of the races in the State's schools system or higher educational institutions.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 462 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 462. Permanent teachers: causes for removal; procedure

A permanent teacher shall not be removed from office except on written and signed charges of immorality, or of wilful neglect of duty, or of incompetency, or of being a member of or of contributing to any group, organization, movement or corporation that is prohibited by law or injunction from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about the integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and then only if found guilty after a hearing by the Orleans Parish school board, which hearing may be private or public, at the option of the teacher. At least ten days in advance of the date of the hearing, the Orleans Parish school board shall furnish the teacher with a copy of the written charges. The teacher

shall have the right to appear before the board with witnesses in his behalf, and with counsel of his selection, all of whom shall be heard by the said board at the hearing. Nothing herein contained shall be construed as depriving the Orleans Parish school board or any teacher thereof of any right of action it or they may be entitled to under the Constitution and laws of the State of Louisiana.

If a permanent teacher is found guilty by the school board, after due and legal hearing as provided herein, on charges of wilful neglect of duty, or of incompetency, or immorality, or of being a member of or of contributing to any group, organization, movement or corporation that is prohibited by law or injunction from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about the integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and ordered removed from office or disciplined by the said board, the teacher may, not more than one year from the date of said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter. If the finding of the school board is reversed by the court and the teacher is ordered reinstated and restored to duty, the teacher shall be entitled to full pay for any loss of time or salary he may have sustained by reason of the action of the said school board.

Section 2. In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect.

Section 3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION

School Employees—Louisiana

Act No. 248 of the 1956 Regular Session of the Louisiana Legislature, approved July 8, 1956, provides for additional causes for removal of public school bus operators. Those causes include membership in any organization prohibited from operating in the state by law or injunction or the advocacy of racial integration of the public schools or institutions of higher learning. That act follows:

AN ACT

To amend and re-enact Section 493 of Title 17 of the Louisiana Revised Statutes of 1950, relative to removal of bus operators; procedures; right to appeal; by adding thereto as causes for removal membership in or contributions to groups, organizations, movements or corporations prohibited from operating in the State of Louisiana, or advocacy of integration of the races in the State's school system or higher educational institutions.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 493 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 493. Removal of bus operators; procedures; right to appeal

A permanent school bus operator shall not be removed from his position except upon written and signed charges of wilful neglect of duty, or incompetence, or immorality, or drunkenness while on duty, or physical disability to perform his duties, or failure to keep his transfer equipment in safe, comfortable and practical operating condition, or of being a member of or of contributing to any group, organization, movement or corporation that is prohibited by law or injunction from operating in the State of Louisiana, or advocating, or in any manner performing any act toward bringing

about integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and then only if found guilty after a hearing by the school board of that parish in which the school bus operator is employed. An additional ground for the removal from office of any permanent school bus operator shall be the abolition, discontinuance or consolidation of the route he serves, but then only if it is found as a fact, after a hearing by the school board of the parish, that it is for the best interests of the school system to abolish, discontinue, or consolidate the route served by the operator sought to be discharged. All hearings hereunder shall be private or public, at the option of the operator. At least fifteen days in advance of the date of the hearing, the school board shall furnish the operator sought to be discharged a copy of the written grounds on which removal or discharge is sought. The operator shall have the right to appear in his own behalf and with counsel of his selection, and be heard by the board at the hearing. Nothing herein shall impair the right of the parties to appeal to a court of competent jurisdiction.

Section 2. In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect.

Section 3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

EDUCATION

School Employees—Louisiana

Act No. 250 of the 1956 Regular Session of the Louisiana Legislature, approved July 8, 1956, provides for additional causes for removal of school employees, other than teachers, of the public schools of Orleans Parish in that state. Those causes include membership in any organization which is prohibited by law or injunction from operating in the state or of advocating the racial integration of the public schools or institutions of higher learning. That act follows:

AN ACT

To amend and re-enact Section 523 of Title 17 of the Louisiana Revised Statutes of 1950, relative to permanent employees; causes for removal; procedure; by adding thereto as causes for removal membership in or contribution to groups, organizations, movements or corporations prohibited from operating in the State of Louisiana, or advocacy of integration of the races in the state's schools system or higher educational institutions.

Be it enacted by the Legislature of Louisiana:

Section 1. Section 523 of Title 17 of the Louisiana Revised Statutes of 1950 is hereby amended and re-enacted to read as follows:

§ 523. Permanent employees; causes for removal; procedure

A regular or permanent employee shall not be dismissed or discharged, except upon written and signed charges of wilful neglect of duty, or of incompetency, dishonesty, immorality, or of insubordination, or of being a member of or of contributing to any group, organization, movement or corporation that is by law or injunction prohibited from operating in the State of Louisiana, or of advocating or in any manner performing any act toward bringing about the integration of the races within the public school system or any public institution of higher learning of the State of Louisiana, and then only if found guilty after a hearing by the Orleans Parish school board, which hearing at the option of said employee may be private or public. The employee shall be furnished by the Orleans Parish school board, at least fifteen days in advance of the date set for the hearing, with a copy of the written charges. The employee shall have the right to appear before the Orleans Parish school board at said hearing with witnesses in his behalf, and with counsel of his selection, all of whom shall be

heard by the board at the hearing.

Nothing herein contained shall impair the right of appeal to the court of appropriate jurisdiction.

Section 2. In case any part of this Act shall be held to be unconstitutional, this shall not have the effect of invalidating any part of it that is constitutional, and the part or parts not affected by such ruling shall continue in full force and effect.

Section 3. All laws or parts of laws in conflict herewith be and the same are hereby repealed.

GOVERNMENTAL FACILITIES

Beaches—Florida

Ordinance No. 913, requiring the clearing of public bathing beaches of "all members of all races" whenever members of two or more different races are present upon such beaches, was enacted by the City of Sarasota, Florida on September 4, 1956.

ORDINANCE NO. 913

AN ORDINANCE to suppress riots, affrays, batteries and civil disorders upon the public gulf beaches in the city of Sarasota; providing for clearing said beaches of all persons under certain conditions; providing penalties for the violation thereof; and providing when the same shall take effect and terminate.

Whereas members of the negroid race have recently adopted the practice of visiting public gulf bathing beaches within the City of Sarasota heretofore used exclusively by members of the Caucasian race in conformity with long established custom and usage, such visits being in groups or caravans, and

Whereas after comparing in open meeting the information obtained by each of the five members of the City Commission in its contacts with the public and after questioning the Chief of Police in said open meeting as to his information, concerning the effect of such activities in stirring up or inciting riots, affrays, batteries and civil disorders, the City Commission of the City of Sarasota, Florida, finds that there is a substantial, present, existing danger that such practices will lead to violence either at the places visited by such groups or to caravans of negroid people, or elsewhere in the community, and

Whereas the City Commission of the City of Sarasota believes that it is incumbent upon the members thereof in their official capacity to take all reasonable steps to prevent such violence and the enmities, tensions, bitterness and adverse publicity which such violence would inevitably produce as the natural consequence thereof, and the procedures set out in this ordinance are well adapted to preventing any such violence before it occurs, and

Whereas it would be uneconomical and impractical to provide sufficient police personnel to prevent all disorders and violence upon the public beaches without at the same time unduly reducing the protection needed by and now afforded to other parts of the City, and

Whereas in a matter of such difficulty and delicacy it is proper that the police force of the City of Sarasota should receive more than usually explicit directions as to their conduct in preventing all such civil disorders, and

Whereas there is a reasonable prospect that with the passage of time the present tensions and threats of violence will be ameliorated to such extent that the procedures set forth below in this ordinance will no longer be necessary, now, therefore,

BE IT ENACTED BY THE PEOPLE OF THE CITY OF SARASOTA:

Section 1. Whenever members of each of two or more different races shall, at the same time, enter or be upon any public gulf bathing beach within the corporate limits of the City of Sarasota, it shall be the duty of the Chief of Police or other officer or official then in charge of the police forces of the City of Sarasota and he is hereby authorized and directed, by and with the assistance of such police forces, forthwith to clear the area involved of all members of all races present, except only City personnel whose duties require them to be in such area, and municipal, county, state or federal officers.

Section 2. Any person failing peaceably to leave a public gulf bathing beach or any nearby street, sidewalk, parking area or other public area, or the adjacent waters, when directed by any police officer to do so under the circumstances set out in Section 1 of this ordinance, shall be guilty of a violation of this ordinance and upon conviction of such violation, shall be punished in the manner provided in Section 1.4 of The Code of the City of Sarasota, Florida, 1950.

Section 3. For the reasons set forth in the preamble, this is an emergency ordinance required to be passed for the immediate protection and preservation of the peace, safety, health and property of the City and its inhabitants, and the same shall take effect immediately upon its passage and shall remain in effect to and including the 30th day of September, A. D., 1957, and thereupon the same shall expire.

PASSED on first reading and adopted as an emergency ordinance on the 20th day of August, A. D., 1956.

PASSED on second reading the 4th day of September, A. D., 1956.

/s/ John D. Kicklighter
As Mayor

PUBLIC ACCOMMODATIONS

Discriminatory Practices—Michigan

Act No. 182 of the Public Acts of Michigan of 1956, approved on April 17, 1956, prohibits discrimination on the basis of race, color or religion by any place of public accommodation or amusement. The act further provides for criminal penalties for violations. That act follows:

AN ACT to amend sections 146 and 147 of Act No. 328 of the Public Acts of 1931, entitled "An act to revise, consolidate, codify and add to the statutes relating to crimes; to define crimes and prescribe the penalties therefor; to provide for the competency of evidence at the trial of persons accused of crime; to provide immunity from prosecution for certain witnesses appearing at such trials; and to repeal certain acts and parts of acts inconsistent with or contravening any of the provisions of this act," section 146 as last amended by Act No. 101 of the Public Acts of 1952, being sections 750.146 and 750.147, respectively, of the Compiled Laws of 1948.

The People of the State of Michigan enact:

Section 1. Sections 146 and 147 of Act No. 328 of the Public Acts of 1931, section 146 as last amended by Act No. 101 of the Public Acts of 1952, being sections 750.146 and 750.147, respectively, of the Compiled Laws of 1948, are hereby amended to read as follows:

Sec. 146. All persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of inns, hotels, motels, government housing, restaurants, eating houses, barber shops, billiard parlors, stores, public conveyances on land and water, theatres, motion picture houses, public educational institutions, in elevators, on escalators, in all methods of air transportation and all other places of public accommodation, amusement, and recreation, subject only to the conditions and limitations established by law and applicable alike to all citizens and to all citizens alike, with uniform prices.

Sec. 147. Any person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place who shall directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communications, notice or advertisement to the effect that any of the accommodations, advantages, facilities and privileges of any such places shall be refused, withheld from or denied to any person on account of race, creed or color or that any particular race, creed or color is not welcome, objectionable or not acceptable, not desired or solicited, shall for every such offense be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $100.00 or

imprisoned for not less than 15 days or both such fine and imprisonment in the discretion of the court; and every person being an owner, lessee, proprietor, manager, superintendent, agent or employee of any such place, and who violates any of the provisions of this section, shall be liable to the injured party, in treble damages sustained, to be recovered in a civil action: Provided, however, That any right of action under this section shall be unassignable. In the event that any person violating this section is operating by virtue of a license issued by the state, or any municipal authority, the court, in addition to the penalty prescribed above, may suspend or revoke such license.

TRANSPORTATION
Intrastate—Texas

The Mayor and City Council of Dallas, Texas, have issued the following statement with reference to enforcement of segregation on public transportation facilities in that city.

"This Council has been requested to enforce regulations on segregation in public transportation. The City Council has given this matter considerable study and desires to give an answer to the inquiry. The Race Question has been before the Courts of this land in connection with public schools, golf courses, restaurants operated in Courthouses, and other related subjects. There seems to be a considerable divergence of opinion as to whether the question has been finally settled or not. We, as laymen, do not believe it is our function to pass upon the question when the highest Courts of this land have had so much difficulty in deciding it. There is a state statute governing the point and any city ordinance would stand or fall with the state law. The enforcement of the state law comes under the jurisdiction of the state courts. We therefore suggest that redress in this matter be sought through proper state tribunals where such matters can be decided rather than before the City Council, whose opinion or decision would be of no effect."

EMPLOYMENT
Sanitary Facilities—Louisiana

Act 395 (HB 1070) of the 1956 Regular Session of the Louisiana Legislature, approved by the Governor on July 12, 1956, requires employers to furnish separate sanitary and other comfort facilities for white and Negro employees. That bill follows:

AN ACT

To require employers to furnish separate sanitary facilities, eating places and drinking facilities for employees of the white and negro races; to provide penalties for violation of this Act, and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. That all persons, firms and corporations employing members of the white and negro races who provide sanitary facilities for their employees shall provide separate sanitary facilities for members of the white and negro races employed by them or permitted to come upon their premises.

Section 2. That all persons, firms or corporations who employ members of the white and negro and provide them with eating or drinking facilities shall provide separate eating places in separate rooms and separate eating and drink-

ing utensils for members of the white and negro races.

Section 3. All such sanitary facilities, eating places and drinking facilities shall be designated 'FOR WHITES ONLY' and 'FOR COLORED ONLY' respectively.

Section 4. Any person, firm or corporation violating the provisions of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 or more than $1,000.00 and imprisoned for not less than 60 days or more than 1 year.

Section 5. This Act is passed in the exercise of the State Police Power to regulate public health, morals and to maintain peace and good order in the State and shall be so construed.

Section 6. That any laws or parts of laws in conflict herewith be and the same are hereby repealed.

CONSTITUTIONAL LAW
Interposition and Nullification—Florida

Senate Concurrent Resolution No. 17-XX of the 1956 Special Session of the Florida Legislature, approved August 1, 1956, denounces "the usurpation of power by the Supreme Court of the United States" and urges action with respect to an amendment to the United States Constitution concerning the reserved powers of the states. That resolution follows:

SENATE CONCURRENT RESOLUTION NO. 17-XX

A CONCURRENT RESOLUTION denouncing the usurpation of power by the Supreme Court of the United States and demanding the preservation of our inherent rights.

WHEREAS, in the life of a democratic nation when it becomes necessary for the people to take notice of and enter a solemn protest against any usurpation of power by those who have been entrusted with high public office, and to demand, as of right, that public officers remain subservient to the people and that they desist from assuming powers which have not, by the people, been placed in their hands, the opinions of their fellow men require that the people set forth in clear and unmistakable language the causes which impel them to such action.

To the end that the declarations now about to be made may be thoroughly understood, and the motives which impel them may be fully appreciated, we first pronounce the following principles, each of which we hold to be an integral part of our American System of Government:

—1—

All political power is inherent in the people and all government derives all its powers from the consent of the governed.

—2—

When the people form a government by the adoption of a written constitution the words of that consitution are but the instrumentalities by which ideas, principles and plans present in the minds of those who adopt the constitution are recorded for accuracy and for preservation to posterity.

—3—

Those who are temporarily invested with power over their fellow countrymen, by being chosen to occupy public offices provided for in a constitution, are charged with a solemn responsibility to exercise only such powers as, under such constitution, have been entrusted to them.

—4—

A division of the powers of government into three departments, executive, legislative and judicial is expressed or implied in every constitution of the American Union, including the Constitution of the United States.

—5—

The Constitution of the United States is a grant of powers to the central federal government, and all powers not delegated to the federal govern-

ment by the constitution, nor prohibited by it to the states, are reserved to the states, or to the people.

—6—

The judicial powers delegated to the federal government are vested by the constitution in the federal judiciary and include the power to interpret, construe and apply the Constitution of the United States.

—7—

The power to interpret, construe and apply the constitution is limited to an ascertainment of the ideas, principles and thoughts that were in the minds of those who drafted and adopted the constitution, including amendments thereto, and the application of those ideas, principles and thoughts to particular factual situations from time to time presented to the courts. The application of constitutional principles may differ with changing conditions, but the principles themselves are unchanging and unchangeable except by the people and then only by the method provided in the constitution.

—8—

A judicial construction of the constitution enunciated by the supreme court of the United States and understood and acquiesced in by the executive department, the congress and the people over a long period of time becomes as much a part of the fundamental law of the land as that which has been written in the constitution itself, and is binding equally upon the people, the states of the union, and the supreme court of the United States.

—9—

The Constitution of the United States may be amended only in the manner provided in that constitution. In the course of history since the adoption of the constitution the people have twenty-one times found it expedient to amend the constitution, and when that unanimity of public opinion which justifies a change in the constitution has developed among the people they have found no difficulty in effecting the changes they found desirable.

—10—

The assumption by any public official, or group of public officials, of power to change the meaning of the Constitution of the United States, other than by the method provided by article V of the constitution, is an abuse of public trust and a tyrannical usurpation of power; and

WHEREAS, under the Constitution of the United States when evidences of the assumption of tyrannical powers appear in the executive or in the congress the people may, by means of the ballot, protect and preserve their liberties by the repudiation of those in office. But when the federal judiciary, which is insulated from the heat of political differences by the life tenure of its membership, enters upon a course of action inimicable to the rights of the people, this method of reform is unavailable. Under such circumstances those restraints which characterize men capable of self-government require that by orderly and peaceable means the inherent and unalienable rights and powers of the people shall be utilized to restore those rights of which they have unjustly and unlawfully been deprived.

We call to the attention of all thinking Americans the following unwarranted and unauthorized acts of invasion of the powers reserved to the states and to the people:

(1) *By decisions rendered May 17, 1954, in Brown vs. Board of Education of Topeka, Harry Briggs, Jr., et al., vs. R. W. Elliott, et al., Dorothy E. Davis, et. al., vs. County School Board of Prince Edward County, Virginia, Frances B. Gebhart, et al., vs. Ethel Louise Belton, et al., 347 U.S. 483, 98 L.Ed. 873,* the supreme court of the United States denied to the sovereign states of the American union the power to regulate public education by the use of practices first declared constitutional by the state of Massachusetts, adopted by the congress, approved by the executive, affirmed and reaffirmed by the supreme court of the United States and practiced by states for more than a century.

It has based these decisions upon matters of fact as to which the parties affected were not given an opportunity to offer evidence or cross examine the witnesses against them.

It has cited as authority for the assumed and asserted facts the unsworn writings of men, one of whom was the hireling of an active participant in the litigation. Others were affiliated with organizations declared by the attorney general of the United States to be subversive, and one of whom, in the same writing which the court cited as authority for its decision stated that the Constitution of the United States is "impractical and unsuited to modern conditions".

In reaching its conclusion the supreme court has disregarded its former pronouncements and attempted to justify such action by the expedient of imputing ignorance of psychology to men whose knowledge of the law and understanding of the constitution could not be impugned, and has expressly predicated its determination of the rights of the people of the several sovereign states of the American union upon the psychological conclusions of Kotinsky, Brameld and Myrdal, and their ilk, rather than the legal conclusions of Taft, Holmes, Van Devanter, Brandeis and their contemporaries upon the bench.

In reaching its conclusion the court, professing itself to be unable to ascertain the intent of those who adopted the fourteenth amendment to the constitution, arbitrarily chose to repudiate the solemn declaration of its meaning rendered under the sanctity of their oaths of office by the justices of the supreme court of the United States at a time when all of its members were contemporaries of those who proposed, discussed, debated, submitted and adopted the amendment.

However, much as citizens of other states may approve and applaud these decisions, they dare not embrace the theory upon which they are based nor the fallicies therein contained lest they themselves by the application of the same theory and fallacies bring destruction to their institutions and to their liberties.

(2) *In a decision rendered May 21, 1956, in Railway Employees Department, American Federation of Labor, International Association of Machinists, et al., vs. Robert L. Hanson, et al.,* ——U.S.——, *100 L.Ed. (advance) p. 633,* the supreme court of the United States held that a union shop agreement negotiated between certain railroads and certain organizations of employees of such railroads which had been authorized by an act of the congress superseded the right-to-work provisions of the constitution of the state of Nebraska and the state statutes enacted pursuant thereto.

The effect of this decision, made in a case instituted by free American citizens to enforce their rights under the constitution of the United States, was to deny these American citizens the right to work at their chosen trade unless they became members of and contributed to the funds of organizations to which they did not wish to belong and to which they did not wish to contribute of their substance.

The effect of this decision was to advise these free American citizens that their right to be immune from any deprivation of liberty or property without due process of law, supposedly guaranteed to them by their federal constitution, did not extend to their right to work, supposedly guaranteed by the constitution of their state, as against the demands of a nonofficial labor organization that they pay to it money to be expended in the negotiation of labor contracts, the terms of which these citizens might or might not seek or desire.

The effect of this decision is to vest in the congress the power to prohibit, permit, or require, closed shops, union shops or open shops or to outlaw unions in each and every industry in America whose activities come within the present expanded concept of interstate commerce.

The effect of this decision is to abrogate, with respect to all employment in interstate business, the constitutions and laws of those seventeen sovereign American states which have sought to protect the rights of their citizens to a free and open labor market, making union membership optional with each worker, protecting him on the one hand from an employer who might desire the destruction of the union, and on the other hand from the union which might desire to exploit him or advocate policies which he did not endorse.

(3) *By a decision rendered January 16, 1956, Danton George Rea vs. United States of America,* ——*U.S.*——, *100 L.Ed. (advance) p. 213,* the supreme court of the United States held that it was within the power of the federal courts to enjoin an officer of the executive department of the federal government from testifying in the courts of the state of New Mexico in a criminal prosecution of one charged with a violation of a statute of that state prohibiting the possession of marihuana.

In so doing the court assumed power to direct the activities of executive officers of the federal government to the extent of forbidding them from testifying voluntarily, or under the process of a state court, as to matters within their knowledge in a case in which no question of privilege or national security was involved.

In so doing the court assumed power to control the administration of local justice in state courts by the indirect method of forbidding witnesses to testify in such state courts while giving lip service to the letter of the rule which

denies to the federal courts any power to control the acts or proceedings of state courts.

In so doing the court assumed power to fix the rules of evidence which should control the administration of justice in state courts.

In so doing the supreme court refused to follow the law as established by former decisions of that court, which were followed and adhered to for many years.

(4) *By a decision rendered April 2, 1956, in Commonwealth of Pennsylvania vs. Steve Nelson ——U.S.——, 100 L.Ed. (advance) p. 415,* the supreme court of the United States has declared that, so long as the present federal law providing punishment for sedition exists, the sovereign state of Pennsylvania and those forty-one of her sister states who have enacted laws against sedition, are without power to enforce their statutes enacted for the purpose of preserving the lives and safety of their citizens from those who would by force and violence overthrow the government of the United States, the states themselves, or any of their political subdivisions.

This decision was rendered in the case of an acknowledged member of the communist party who had been duly convicted in the constitutional trial courts of Pennsylvania of violating the sedition laws of that commonwealth.

In reaching the conclusion announced, the supreme court refused to follow the previously accepted construction and interpretation of the constitution of the United States as stated in unmistakable language in prior decisions of that court.

In reaching the announced conclusion, the court decried, and seemed to find obnoxious the fact that under the Pennsylvania law a private citizen could set in motion the legal processes by which those charged with conspiracy against the government of the commonwealth of Pennsylvania could be brought to trial and, if found guilty, be punished by due course of Pennsylvania law.

In reaching the announced conclusion the court dismissed with a casual comment in a footnote to its decision the solemn declaration of the congress that "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

In reaching the announced conclusion the court did not limit the impact of its judgment to statutes involving sedition against the government of the United States, but expressly pointed out that a state has no power to enact laws for its own protection, but must rely upon the federal authorities for the suppression of sedition against the state itself or its political subdivisions.

(5) *In a decision rendered April 23, 1956, in Judson Griffin, et al. vs. People of the State of Illinois, ——U.S.——, 100 L.Ed. (advance) p. 483,* the supreme court of the United States held that the due process and equal protection clauses of the constitution of the United States rendered illegal the imprisonment of one charged with armed robbery and duly convicted in the trial court of Illinois, unless the state of Illinois provided the defendant, free of charge, with a transcript of the proceedings to be used in an appeal of his conviction.

The basis of this decision was that, since the law of Illinois authorized appeals in criminal cases, and the particular defendant in question was insolvent, the fourteenth amendment required the state to pay the costs of his appeal.

The effect of this decision is to place upon each of the states the duty of guaranteeing the financial ability of every citizen to exercise constitutional rights.

(6) *By a decision rendered April 9, 1956, in Harry Slochower vs. Board of Higher Education of the city of New York, ——U.S.——, 100 L. Ed. (advance) p. 449,* the supreme court of the United States held that the city of New York had violated the Constitution of the United States by the summary discharge of a public employee who had refused to answer questions relative to his communistic activities and claimed the benefit of the fifth amendment to the constitution in so doing.

In so holding the court held invalid a charter provision of the city of New York designed to provide for the removal, as quickly as possible, of those public employees who were deemed by the people of that great city to be unfit to be entrusted with any part in the administration of the public affairs of the city.

In so holding the court revoked the prompt removal from a state school of a teacher whose influence was deemed by the school authorities to be inimicable to the best interests of the students in such school.

In so holding the court construed the due process clause of the constitution to give to the

federal courts the power to examine into minute details of all administrative state action and to apply arbitrarily to such state action the personal concepts of the justices of the supreme court rather than fixed principles of constitutional law; and

WHEREAS, these, and other decisions of the supreme court of the United States, can lead the student of law, of government, or of history to but one unavoidable conclusion:

As presently constituted, the supreme court of the United States has embraced the philosophy that the Constitution of the United States is not a declaration of fixed or definite principles, unchanging in their meaning, although varying in their application to different factual situations. On the contrary, recent decisions are obviously the result of a theory that changing conditions and variations in social and economic practices justify the court in changing, by judicial fiat, the meaning of the constitution in order that it may serve what the members of the court deem to be the best interests of the people.

Unless the application of this concept of the powers of the supreme court of the United States in regard to the rights of the people, the powers of the different departments of government, and the separate and distinct powers of the states and of the federal government be stopped, the inevitable result will be to end the American system of constitutional government, and to substitute therefor government by a judicial oligarchy under which the states, and the executive and legislative departments of the federal government may exercise only such powers as the federal judiciary deems fit to permit them to exercise; and NOW, THEREFORE,

BE IT RESOLVED BY THE SENATE OF THE STATE OF FLORIDA, THE HOUSE OF REPRESENTATIVES CONCURRING:

Section 1. That we the PEOPLE OF THE STATE OF FLORIDA, speaking by and through our duly elected representatives in the senate and the house of representatives of the state of Florida, do hereby solemnly declare:

(1) That the supreme court of the United States of America as presently constituted knowingly, wilfully, and over the most respectful protest of litigants before the court, including many of the sovereign states of the union, has determined to, and has entered upon a policy of substituting the personal and individual ideas of the members of the court as to what the Constitution of the United States should be for the letter of the constitution as it was written by our forefathers, the meaning of the constitution as it was understood by those who drafted it and voted for its adoption, and the intent of the constitution as it has been declared by the highest court of the nation over many years and in many able decisions.

(2) That the personal, social, economic and political ideas of the members of the supreme court of the United States do not constitute the proper criterion for the admeasurement of states rights or the powers of the several departments of the federal government or the rights of individual citizens.

(3) That acts of the federal judiciary in wilfully asserting a meaning of the constitution unsupported by the written document, the history of the times in which it was adopted, the construction placed upon it by contemporary courts and the meaning ascribed to it by the people for generations constitutes usurpation of power which, if condoned by the people and allowed to continue, will destroy the American system of government.

Section 2. That, if wise and beneficient men may make changes in the constitution that are beneficial in the light of changing conditions, others may, with equal propriety make changes which will destroy the rights of the people. It was to guard against conferring the power upon public officials to make mistakes that the people reserved unto themselves the power to amend the constitution when changing conditions demand a change in the basic law.

That while disobedience to constituted authority is the mother of anarchy, it is the history of free men that they will not supinely permit government to become the master of the people, and will never yield unrestrained authority to any group of public officers.

Section 3. That it is the duty of every public official sworn to support the constitution of the United States, and of every citizen who would maintain the principles of government under which this nation has grown to its present greatness, regardless of their views as to the abstract justice of the result of any of the acts of usurpation herein enumerated to insist, and we do hereby insist and demand that the supreme court

of the United States recede from its arbitrary assertion of power to change the fundamental law of the land to meet the personal views of its members as to the present needs of the people, leaving to the people themselves the responsibility of determining when, and to what extent, their constitution should be amended.

Section 4. That, and to this end we respectfully and earnestly urge the executive officers of the nation, the congress of the United States, the governor and the attorney general of each of our sister states, and the bar of America, the traditional defender of constitutional government, and all who love and revere the constitution of the United States, to join us in this declaration, and to do everything within the scope of their personal and official authority to initiate and effect an amendment to article X of the constitution of the United States defining the powers reserved to the respective sovereign states, enumerating and defining the powers so reserved to include, among others, the power to regulate the fields of activity mentioned in this report.

Section 5. That copies of this resolution be sent to the chief executive officers of each state in the union, the members of congress of the United States, the attorney general of each sister state, the American Bar Association and to any other persons designated by the members of the legislature.

Approved by the Governor August 1, 1956.

Filed in Office Secretary of State August 1, 1956.

SPORTS

Interracial—Louisiana

Act 579 (HB 1412) of the 1956 Regular Session of the Louisiana Legislature, signed by the Governor on July 16, 1956, prohibits interracial participation in athletic events or social functions and requires separate seating of white and Negro spectators at such events. That bill follows:

AN ACT

To prohibit all interracial dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities, to provide for separate seating and other facilities for whites and negroes; to provide penalties for the violation of this Act, to provide a date on which this Act shall become effective, and to repeal all laws or parts of laws in conflict herewith.

Be it enacted by the Legislature of Louisiana:

Section 1. That all persons, firms and corporations are prohibited from sponsoring, arranging, participating in, or permitting on premises under their control any dancing, social functions, entertainments, athletic training, games, sports or contests and other such activities involving personal and social contacts, in which the participants or contestants are members of the white and negro races.

Section 2. That at any entertainment or athletic contest, where the public is invited or may attend, the sponsors or those in control of the premises shall provide separate seating arrangements, and separate sanitary, drinking water and any other facilities for members of the white and negro races, and to mark such separate accommodations and facilities with signs printed in bold letters.

Section 3. That white persons are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for members of the negro race; and members of the negro race are prohibited from sitting in or using any part of seating arrangements and sanitary or other facilities set apart for white persons.

Section 4. Any person, firm or corporation violating the provisions of this Act shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than $100.00 or more than $1,000.00 and imprisoned for not less than 60 days or more than 1 year.

Section 5. This Act is passed in the exer-

cise of the State Police Power to regulate public health, morals and to maintain peace and good order in the State and shall be so construed. This Act shall not become effective until the fifteenth (15th) day of October, 1956. None of the provisions of this bill shall be construed to apply to religious gatherings, services or functions.

Section 6. That any laws or parts of laws in conflict herewith be and the same are hereby repealed.

CIVIL DISTURBANCES

Emergency Powers—Florida

Chapter 31389 (Senate Bill No. 10-XX) of the session laws of Florida enacted by the 1956 Special Session of the Florida Legislature, approved August 1, 1956, confers on the Governor additional emergency powers to quell disturbances at public parks, buildings or other facilities.

CHAPTER 31389
SENATE BILL NO. 10-XX

AN ACT to confer additional emergency powers upon the Governor of Florida; to authorize and empower the Governor to promulgate and enforce rules and regulations to protect the public against violence, property damage and overt threat of violence; to authorize the State Military Forces and Law Enforcement Agencies of State or County to enforce rules and regulations; to provide for posting rules and regulations and filing with the Secretary of State; providing an effective date; and providing an expiration date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. The Governor of Florida is hereby authorized and empowered to promulgate and enforce such emergency rules and regulations as are necessary to prevent, control, or quell violence, threatened or actual, during any emergency lawfully declared by him to exist. In order to protect the public welfare, persons and property of citizens against violence, public property damage, overt threats of violence, and to maintain peace, tranquillity and good order in the state, these rules and regulations may control public parks, public buildings, or any other public facility in Florida, and shall regulate the manner of use, the time of use, and persons using the facility during any emergency. These rules and regulations shall have the same force and effect as law during any emergency, and shall remain in effect during a period of time and in such manner, and shall affect such persons, public buildings and public facilities as in the judgment of the Governor shall best provide a safeguard for protection of persons and property where danger, violence and threats exist, or are threatened among the citizens of Florida.

Section 2. Whenever the Governor shall promulgate emergency rules and regulations, such rules and regulations shall be published and posted during the emergency in the area affected, and copies of the rules shall be filed with the Secretary of State for public record.

Section 3. The Governor shall have emergency power to call upon the military forces of the state or any other law enforcement agency, state or county, to enforce the rules and regulations authorized by this law.

Section 4. The powers herein granted are supplemental to and in aid of powers now vested in the Governor of the State of Florida under the Constitution, statutory laws and police powers of said State.

Section 5. It is declared to be the legislative intent that, if any section, subsection, sentence, clause or provision of this act is held invalid, the remainder of the act shall not be affected.

Section 6. This Act shall take effect immediately upon its becoming a law and shall continue in full force and effect until July 1, 1961.

Approved by the Governor August 1, 1956.

Filed in Office Secretary of the State August 1, 1956.

CIVIL DISTURBANCES

Emergency Powers—Florida

Chapter 31390 (Senate Bill No. 13-XX) of the session laws of Florida enacted by the 1956 Special Session of the Florida Legislature, approved August 1, 1956, confers on the governor additional powers to prevent and subdue acts of violence within the state. This act provides for the issuance of proclamations of states of emergency and for the quelling of riots, unlawful assemblies, or other violence.

CHAPTER 31390
SENATE BILL NO. 13-XX

AN ACT in aid of existing powers and to confer additional powers upon the Governor of the State of Florida; to authorize and empower the Governor of the State of Florida to protect the public against violence, property damage and overt threats of violence; to issue his proclamation and order; to order and direct any person, corporation, association, or group of persons, to prevent or refrain from causing damage to life, limb or property, or a breach of the peace; to authorize and direct the State Militia, the sheriffs, or the State Highway Patrol, or any state or county official of the State of Florida to maintain peace and good order, to provide for the enforcement of the Governor's proclamation relating to the same by all the courts of the State of Florida, providing for the time limit within which this Act shall be effective.

WHEREAS, the State of Florida, through its constituted officials under the Constitution, statutory law and police power of the State, may control violence (threatened or actual against persons or property); and, whereas, the State has the dominant interest in and is the natural guardian of the public against violence and is empowered under the general sovereign authority of the State to prevent violence and overt threats of violence;

Therefore, be it Enacted by the Legislature of the State of Florida:

Section 1. The Governor of the State of Florida is hereby authorized and empowered to take such measures and to do all and every act and thing which he may deem necessary in order to prevent overt threats of violence or violence, to the person or property of citizens of the State and to maintain peace, tranquillity and good order in the State, and in any political subdivision thereof, and in any area of the State of Florida designated by him.

Section 2. The Governor of the State of Florida when, in his opinion, the facts warrant, shall, by proclamation, declare that, because of unlawful assemblage, violence, overt threats of violence, or otherwise, a danger exist to the person or property of any citizen or citizens of the State of Florida and that the peace and tranquillity of the State of Florida, or any political subdivision thereof, or any area of the State of Florida designated by him, is threatened, and because thereof an emergency, with reference to said threats and danger, exists. In all such cases when the Governor of the State of Florida shall issue his proclamation as herein provided he shall be and is hereby further authorized and empowered, to cope with said threats and danger, to order and direct any individual person, corporation, association or group of persons to do any act which would in his opinion prevent danger to life, limb or property, prevent a breach of the peace or he may order such individual person, corporation, association or group of persons to refrain from doing any act or thing which would, in his opinion, endanger life, limb, or property, or cause, or tend to cause, a breach of the peace, or endanger the peace and good order of society, and shall have full power by appropriate means to enforce such order or proclamation.

Section 3. The Governor of the State of Florida, upon the issuance of a proclamation as provided for in Section 2 hereof shall forthwith file the same in the office of the Secretary of State for recording, which proclamation shall be effective upon issuance and remain in full force and effect until revoked by the Governor, and he is hereby authorized and empowered to take and exercise any, either or all of the following actions, powers and prerogatives:

(a) Call out the military forces of the State (State Militia) and order and direct said forces

to take such action as in his judgment may be necessary to avert the threatened danger and to maintain peace and good order in the particular circumstances.

(b) Order any sheriff or sheriffs of this State, pursuant to a proclamation as herein provided, to exercise fully the powers granted them, and each of them, under paragraph 7 of Section 30.15, Florida Statutes 1955, (suppress tumults, riots and unlawful assemblies in their counties with force and strong hand when necessary) and to do all things necessary to maintain peace and good order.

(c) Order and direct the State Highway Patrol, and each and every officer thereof, to do and perform such acts and services as he may direct and in his judgment necessary in the circumstances to maintain peace and good order.

(d) Authorize, order or direct any State, county or city official to enforce the provisions of such proclamation in each and every and all of the courts in the State of Florida by injunction, mandamus, or other appropriate legal action.

Section 4. The Governor of the State of Florida is hereby authorized and empowered to intervene in any situation where there exists violence, overt threats of violence to persons or property and take complete control thereof to prevent violence, or to quell violence or any disturbance or disorder which threatens the peace and good order of society.

Section 5. The powers herein granted are supplemental to and in aid of powers now vested in the Governor of the State of Florida under the Constitution, statutory laws and police powers of said State.

Section 6. This Act shall take effect immediately upon its becoming a law and shall continue in full force and effect until July 1, 1961.

Approved by the Governor August 1, 1956.

Filed in Office Secretary of the State August 1, 1956.

CORPORATIONS

NAACP—Georgia (Proposed)

The Attorney General of Georgia has proposed to the legislature of that state the enactment of legislation "regulating and governing corporations, associations, organizations and other groups which seek to influence public opinion or encourage and promote litigation," particularly the National Association for the Advancement of Colored People. The proposal is in the form of a resolution creating a joint legislative committee to investigate and recommend legislation. The memorandum by which the resolution was forwarded and the proposed resolution follow:

"This resolution is one of several measures I propose to recommend to the Governor and General Assembly for enactment at the regular session in January, next. With the passage of this resolution the State Government will have the power to investigate the internal operations of such organizations as the National Association for the Advancement of Colored People. Unlike Alabama, Louisiana and South Carolina, Georgia's present laws are not broad enough to enable the State to obtain the necessary legal information or to punish and restrain any illegal and improper operations by such organizations.

"In an address last year before the Peace Officers' Convention in Atlanta, I submitted authentic information demonstrating that a majority of the officers and directors of the National Association for the Advancement of Colored People have Communist or subversive records, and that their "special legal and education fund" is subsidized by Communists and enemies of the Southern area of our country. The charges have never been answered, even though more than one million copies of the address have been circulated in pamphlet form by the Citizens' Councils of several Southern states. The information was transmitted to the Lt. Governor and Speaker of the House at the last session along with a resolution designed to outlaw this organization as a matter of public policy under the police powers of the State. It is now a matter of public record.

In my opinion the resolution will be considered next January.

"That resolution and the proposed new bill to create a joint investigating committee will afford appropriate officials necessary means of restraining the ruthless and probable illegal drive of the NAACP to destroy constitutional government and our traditional pattern of racial segregation. This is only the beginning of my efforts as Attorney General to establish the fact that such organizations as NAACP should be outlawed.

"It has been demonstrated beyond any doubt that the NAACP is an enemy of the South, that it is the most potent enemy of our segregated system of public schools, and that its leadership represents the most effective sponsors of insidious and unconstitutional civil rights measures. The legislatures and appropriate state officials of every Southern state should unite in an all-out fight to liquidate this particular enemy of the South and constitutional government. There is no time for shadow boxing if we are to preserve sovereign dignity as states under a Republican form of government. South Carolina, Alabama, Mississippi and Louisiana have led the way—it is Georgia's move next."

Eugene Cook
Attorney General

A RESOLUTION

To create a joint interim committee of the House and Senate to investigate and hold hearings relative to the need, or lack of need, for legislation regulating and governing corporations, associations, organizations and other groups which seek to influence public opinion or encourage and promote litigation; to provide for the organization, powers and duties of said committee; to provide for hearings; to authorize said committee to issue subpoenas and require testimony; to prescribe misdemeanor punishment for failure to respond to any such subpoena, or failure or refusal of any witness to answer any question, without cause; to provide for witness fees; to provide for employment of a clerical and investigative force by the committee; to provide for payment of expenses; to provide that the Attorney General shall represent said committee; to repeal conflicting laws; and for other purposes.

WHEREAS, this General Assembly is reliably informed that certain corporations and organizations active in this State are fomenting strife, and encouraging and promoting litigation, and

WHEREAS, this General Assembly also has before it evidence that certain of said corporations and organizations have Communistic affiliations and backgrounds which have been withheld from the general public, and

WHEREAS, said corporations and organizations are reported to be soliciting funds and memberships from well-meaning but misguided zealots and liberals who are not aware of the subversive character of such organizations and corporations, and

WHEREAS, it is therefore appropriate that this General Assembly make investigation as to the need, or lack of need, for legislation regulating such organizations and associations to the end that the public will be better informed as to their true motives and aims;

NOW THEREFORE BE IT RESOLVED BY THE GENERAL ASSEMBLY AS FOLLOWS:

Section 1. There is hereby created a joint House-Senate Committee, to be composed of three members of the House appointed by the Speaker thereof, and three members of the Senate, to be appointed by the President thereof. Said Committee shall convene as soon as possible after adjournment of the General Assembly and organize by electing a Chairman.

Section 2. The Committee shall make a thorough investigation of the activities of all corporations, organizations, associations and other like groups which seek to influence public opinion or encourage or promote litigation in this State. The Committee shall conduct its investigation so as to collect evidence and information which shall be necessary or useful in the drafting and preparation of legislation dealing with the following subjects:

1. Barratry.
2. The need, or lack of need, for legislation requiring all corporations, organizations, associations and other groups, as referred to above to register as lobbyists and divulge information to the public concerning their officials, memberships, finances and other information which would serve to protect the public in dealing with such associations or corporations.

3. Any needed amendments to the Subversive Activities Act.
4. The need, or lack of need, for legislation which would assist in the investigation of such organizations, corporations, and associations relative to the State income tax laws.
5. The need, or lack of need, for legislation re-defining the taxable status of such corporations, associations, organizations and other groups, as above referred to, and further defining the status of donations to such organizations or corporations from a taxation standpoint.

Section 3. Said Committee may hold hearings anywhere in the State, and shall have authority to issue subpoenas requiring the attendance of witnesses and the production of papers, records and other documents which may be served by any Sheriff of this State, or any agent or investigator of the Committee, and his return shown thereon. Any person, firm, corporation, association or organization which fails to appear in response to any such subpoena as therein required, or any person who fails or refuses, without legal cause, to answer any question propounded to him, shall be guilty of a misdemeanor and punished as provided by law. The Chairman of the Committee, or anyone acting in his absence, shall be authorized to administer oath to all witnesses. Every witness appearing pursuant to subpoena shall be entitled to receive, upon request, the same fee as is provided by law for witnesses in the Superior Courts, and where the attendance of witnesses residing outside the county wherein the hearing is held is required, they shall be entitled to receive the sum of Seven ($7.00) Dollars after so appearing, upon certification thereof by the Chairman to the State Treasurer.

Section 4. Each member of the Committee shall receive, in addition to actual travel expenses, the same per diem as received by members of other interim committees, while engaged in official duties as a member of said Committee.

Section 5. Said Committee shall be authorized to employ a clerical force and such investigators and other personnel as it may deem necessary to carry out the provisions of this Act, and may expend moneys for the procuring of information from other sources.

Section 6. All funds herein authorized to be spent by the Committee, including the per diem and travel expenses of the members thereof, shall be paid out of funds appropriated by law for the General Assembly, upon certification to the State Treasurer of such expenses by the Chairman.

Section 7. The Attorney General shall be the legal counsel for the Committee, and the latter may require services of the Attorney General or an Assistant designated by him, in the conduct of hearings and examination of witnesses.

Section 8. Unless continued in effect by law, the Committee shall complete its investigations and make its report, together with any recommendations as to legislation, to the 1958 General Assembly.

Section 9. That all laws and parts of laws in conflict with this Act are hereby repealed.

ORGANIZATIONS

Solicitation of Membership—Virginia

On August 6, 1956, the Board of Supervisors of Halifax County, Virginia, adopted an ordinance regulating the solicitation of memberships in organizations, unions or societies which require the payment of dues or may assess members. That ordinance follows:

At a regular meeting of the Halifax County Board of Supervisors held on Monday, August 6, 1956 at 9:00 o'clock A. M.

On motion of O. J. Thompson, seconded by F. L. Powell, and unanimously carried, the following ordinance was adopted and ordered published once a week for two successive weeks in a newspaper in the County of Halifax, Virginia.

AN ORDINANCE TO REGULATE THE SOLICITATION OF MEMBERSHIP IN ORGANIZATIONS AMONG THE CITIZENS OF

HALIFAX COUNTY, STATE OF VIRGINIA; TO PROVIDE FOR PERMITS FOR PERSONS OR AGENTS SOLICITING SUCH MEMBERS; AND FOR VIOLATIONS OF THIS ORDINANCE.

BE IT, AND IT IS HEREBY ORDAINED, BY THE BOARD OF SUPERVISORS OF HALIFAX COUNTY, VIRGINIA, AS FOLLOWS:

Section I—Before any person, persons, firms or organization shall solicit membership in said county for any organization, union or society, of any sort which requires from its members the payments of membership fee, dues or is entitled to make assessment against its members, such person or persons shall make application in writing to the Commissioner of Revenue of said county for the issuance of a permit to solicit members in such organization from among the citizens of Halifax County.

Section II—Such application shall give the name and nature of such organization for which applicant desires to solicit members, whether such organization is incorporated or unincorporated, the location of its principal office and place of business and the names of its officers, along with date of its organization, and its assets and liabilities. Such application shall further contain the age and residence of applicant, including places of residence for past ten years, and as well as business or profession in which such applicant has been engaged during said time, and shall furnish at least three persons as reference to applicant's character. Such application shall also furnish the information as to whether applicant is a salaried employee of the organization for which he is soliciting members, and what compensation, if any, he receives for obtaining members.

Section III—This application shall be submitted to a regular meeting of the Board of Supervisors of said county, and in event it is desired by said Board to investigate further the information given in the application, or in the event the applicant desires a formal hearing on such application, such hearing shall be set for a time not later than the next regular meeting of said Board. At such hearing the applicant may submit for consideration any evidence that he may desire bearing on the application, and any interested person shall have right of appearing and giving evidence to the contrary.

Section IV—In passing upon such application the Board of Supervisors shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effect upon the general welfare of citizens of said county.

Section V—The granting or refusing to grant of such application for a permit shall be determined by vote of the Board of Supervisors, after consideration, and hearing if same is requested by applicant or said Board of Supervisors, in the same manner as other matters are so granted or denied by the vote of said Board.

Section VI—Any person, persons, firm or corporation soliciting members for any organization from among citizens or persons employed in the County of Halifax without first obtaining a permit and license therefor shall be punished as provided by Section 19-265 of the Code of Virginia.

Section VII—Should any section or portion of this ordinance be held void, it shall not affect the remaining sections and portions of same.

ADMINISTRATIVE AGENCIES

EDUCATION
Public Schools—Arkansas

Plans adopted by school boards to integrate public schools in Little Rock and Van Buren, Arkansas, are reproduced *supra* at pages 853 and 860 respectively.

EDUCATION
Public Schools—Florida

Subsequent to the enactment of the "School Placement Law" in Florida *(supra*, p. 924) the Superintendent of Public Instruction of Florida issued suggested rules and regulations to be adopted by the various county boards of public instruction, as well as a suggested form of application for pupil assignment to implement the statute. These suggested materials follow:

Tallahassee, Florida
August 15, 1956

MEMORANDUM TO: Florida County Superintendents, School Board Members, and School Board Attorneys—

FROM: Thomas D. Bailey, Superintendent of Public Instruction

SUBJECT: Implementation of School Laws Passed by Special Session of Legislature—

Since the recent Special Session of the Legislature, there have been many requests for the State Department of Education to advise local school officials concerning the laws passed pursuant to the report of the Fabisinski Committee. Copies of these laws are included herewith. They are:

Senate Bill No. 10-XX—Granting special powers to the Governor. [*See p. 954.*]

Senate Bill No. 11-XX—Relating to local management of Public Schools - Pupil Assignments. [*See p. 924.*]

Senate Bill No. 12-XX—Granting local board authority to choose among school personnel in certain circumstances. [*See p. 940.*]

Senate Bill No. 13-XX—Granting special powers to the Governor. [*See p. 955.*]

Consideration of these requests and advice from members of the Fabisinski Committee suggested the advisability of a conference of county superintendents and school board attorneys to consider the new laws. Such a conference was called, to be held Wednesday, August 15, 1956, at Tallahassee.

Among the laws passed pursuant to the Fabisinski Committee Report, Senate Bill 11-XX, the Pupil Assignment Law, is of most immediate concern to school officials, inasmuch as its implementation is involved in the imminent opening of the 1956-57 term of school. Therefore, it is expected that most of the discussion at the Tallahassee meeting will be devoted to the Pupil Assignment Law.

Responsibility for the administration of the Pupil Assignment Law is specifically placed on the local county school officials. Competent authorities emphasize that the effectiveness of the law in promoting the welfare of the pupils and

[Together with these suggested rules for applying the school placement law, the Florida superintendent of public instruction supplied these suggested forms for use in connection therewith.]

Suggested Form

APPLICATION FOR PUPIL ASSIGNMENT

(This form must be completed in full and filed with the County Board.)

To: COUNTY BOARD OF PUBLIC INSTRUCTION, _____ COUNTY, FLORIDA

1. **Name of Pupil** _____
   Last First Middle
2. **Date of Pupil's Birth** _____ **Sex** _____
   Day Month Year
3. **Place of Pupil's Birth** _____
   City County State
4. **School last attended** _____
   Name and Location
5. **Total number of years in school** _____ **Last grade attended** _____ **Promoted to** _____ **Grade.**
6. **Father's Name** _____ **Address** _____

   Father's Occupation _____ **Telephone** _____
7. **Mother's Name** _____ **Address** _____

   Mother's Occupation _____ **Telephone** _____
8. **Name of Legal Guardian, if any** _____ **Address** _____

   Occupation of Guardian _____ **Telephone** _____
9. **With Whom Does Pupil Live?** _____ **Address** _____
10. **Information Relative to Other Brothers and Sisters Now Attending Public Schools:**

NAME	AGE	NAME OF SCHOOL TO WHICH ASSIGNED
1.		
2.		
3.		

Note: The board reserves the right to request any further information that may be relevant for consideration in connection with this application.

TO BE COMPLETED BY BOARD

On basis of information relative to the above pupil, the Board of Public Instruction for _____ **County, Florida, assigns** _____
Name of Pupil

to _____.
School

_____ _____
Signature of County Superintendent Signature of Chairman of Board

(See other side)

the school system will depend on the wisdom and care with which it is administered at the local level. Neither the State Department of Education nor any other state level agency is given any duty or responsibility in connection with its administration. The State Board of Education and the attorney general's office enter into the picture only on appeal from local administrative decisions. However, the State Department of Education in compliance with its general duties and responsibilities will assist local officials in any way possible.

The sample Rules and Regulations and forms attached hereto are based on the advice of members of the Fabisinski Committee, and have been reviewed by one member of the committee. These materials follow closely those suggested in North Carolina for implementing a similar law, which has been in effect since March, 1955. It is not by any means suggested that any school board adopt these materials exactly in the form presented. They are made available only as something to begin with in formulating the rules and regulations which the county boards are required by law to adopt in implementing the Pupil Assignment Law. School boards are urged to make independent studies of the law and of their own local situations and, with competent legal advice, to formulate rules and regulations pursuant to the law, specifically adapted to their own special situations.

Suggested Rules and Regulations and Forms for Consideration by County School Boards when Planning Implementation of the Pupil Assignment Law

WHEREAS, the Legislature of the State of Florida in extraordinary session, 1956, enacted Senate Bill No. 11-XX, Chapter 31380, relating to assignment of pupils in the public schools and the State of Florida, and

WHEREAS, said enactment of the Florida Legislature required that the Board of Public Instruction of the several counties of the State of Florida shall assign pupils to the public schools

APPLICATION FOR PUPIL REASSIGNMENT

(Be sure that the information on all items on opposite side of this page is filled in. ANSWER questions 11 and 12 on this page only if re-assignment to another school is being sought.)

11. School to which reassignment is requested_____

12. State specific reasons why pupil should be reassigned to the school requested above. (Answer fully and attach additional pages if necessary)

Date_____ **Signed**_____

Signature of Parent or Guardian

FOR BOARD USE ONLY

Application: APPROVED ( ) DISAPPROVED ( )

FOR THE BOARD OF PUBLIC INSTRUCTION:

Date_____

Title

so as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils therein and the health, safety, education and general welfare of such pupils, taking into account such sociological, psychological and like intangible social scientific factors as will prevent, as nearly as practicable, any condition of socio-economic class consciousness among the pupils attending any given school in order that each pupil may be afforded an opportunity for a normal adjustment to an environment and receive the highest standard of instruction within his ability to understand and assimilate, and

WHEREAS, the said enactment further requires the said Board in the exercise of its authority to prescribe school bus transportation routes and adopt such reasonable rules and regulations relative thereto as in the opinion of the Board shall best accomplish the purposes of the act, and

WHEREAS, the Board of Public Instruction of _____ County has considered the several factors set forth and prescribed in said enactment of the Florida Legislature, and

WHEREAS, this Board of Public Instruction after such consideration finds that the intent and purpose of said law and the welfare of the pupils of _____ County will best be attained by the plan of assignment to schools and transportation stipulated in the rules and regulations below;

THEREFORE, BE IT RESOLVED by the Board of Public Instruction of _____ County, Florida, in meeting assembled this ____ day of _____, A.D. 1956, that the following rules and regulations made pursuant to Chapter 31380, Laws of Florida, Special Session, 1956, referred to the Pupil Assignment Law, be and are hereby adopted:

Section 1. *Definitions*

As used in these rules and regulations the following definitions will apply:

(a) The words "child" and "pupil" mean a person residing in this county qualified under the laws of Florida for admission to a public school and desiring to attend a public school.

(b) The word "parent" means the father, mother, or guardian of any child, or the person standing *in loco parentis* to any child, and shall include, when applicable, one or more persons.

(c) The word "board" means the Board of Public Instruction of _____ County.

(d) The word "superintendent" means the Superintendent of Public Instruction of _____ County.

(e) The word "assignment" means the act of the board designating the particular school in which a child shall be enrolled.

(f) The word "enrollment" means the actual acceptance in a school and listing on the rolls of the school a pupil properly assigned thereto by the board.

(g) The words "transported pupil" mean a child eligible to be transported, under Florida School Laws, to a public school at public expense.

(h) A "school bus route" means a route specifically designated by the board to be traveled regularly by each school bus.

Section 2. Each child enrolled in the public schools of _____ County, in the school year 1955-56, is hereby assigned for the school year 1956-57 to the school which he or she attended during the last school term, except as to those children which by promotion are required to attend a different school and such children so promoted are hereby assigned to the school which they would have attended last year had they then been so promoted.

Section 3. Prior to the close of the 1956-57 school year or such other date as the Board may specify and each year thereafter this Board, pursuant to the provisions of the Pupil Assignment Law, will assign to a school for the following year each child theretofore attending a school by assignment from this Board. The record of all assignments shall be open for inspection in the office of the superintendent, and, in addition thereto, notice of assignment shall be given to each pupil and his parents.

Section 4. This Board will assign to a school for the 1956-57 school term and each year thereafter each qualified child, not heretofore attending a school by assignment from this Board, whose parent applies for admission of such child. Such assignment will be made pursuant to all of the provisions of the Pupil Assignment Law. Application for admission shall be made on forms to be approved by the board and made available at the office of the superintendent and

the principal of each school. When completed, such applications shall be submitted by the superintendent for action by the board. Records of assignments hereunder shall be open for inspection in the office of the superintendent, and notice of assignment shall promptly be given the pupil and his parents.

Section 5. The board will establish bus routes to provide transportation to the respective schools for such pupils as are eligible under the law and the policies of the board relating to school transportation. No pupil shall ride any bus other than one serving the school to which he is assigned under these rules and regulations.

Section 6. No principal shall enroll in his school any pupil not properly assigned thereto.

Section 7. The Board expressly reserves the right to change the assignment of any pupil at any time whenever in the opinion of the board upon consideration of the factors set forth in the Pupil Assignment Law, such reassignment would be in accord with the intent and purpose of said law. The superintendent shall cause written notices of such change of assignment to be properly given.

Section 8. Any parent residing in this county who desires a change in the assignment of his child must apply in writing for the admission of such child to another school. Such application must be made at least _____ days prior to the opening of the school, or _____ days prior to the date reassignment is desired to become effective, or such other date as the Board may specify, and shall be made on forms to be approved by the Board and made available in the office of each principal and the superintendent. The application shall be delivered by the parent, during regular office hours, to the principal of the school to which such child was last assigned by the Board, or to the principal of the school to which reassignment is desired. If the principal is unavailable, the application may be delivered to the superintendent. The application shall state in detail the specific reasons reassignment is requested, the specific reasons why the applicant thinks the child should be admitted to the school to which his admission is sought, together with such other information as may be called for on such forms, or as may be requested by this Board. An incomplete application will not be considered by the Board. Each application for reassignment, with a notation thereon of the date on which and by whom it was received, shall be promptly transmitted by the principal to the superintendent and, by him, to the Board.

Section 9. Such application shall be considered at the earliest practicable date by the Board, and if the reassignment is granted, the applicant and the principals of the schools concerned shall be promptly notified.

Section 10. If the application is denied the applicant shall be notified promptly and, if a hearing is requested, shall be advised as to the time and place at which he shall have the right to be heard and to present witnesses in support of his application. In addition to receiving such evidence as may be presented on behalf of applicant, the Board may receive evidence in opposition to the granting of the application and may conduct investigations on any objection offered, or on its own motion, including examination of the child involved so as to make a proper decision on the application. A decision upon the application shall be rendered by the Board as early as may be practicable, and a final order entered thereon. The applicant shall promptly be notified thereof in writing. A permanent record of proceedings and evidence upon such applications shall be kept.

Section 11. A copy of these rules and regulations shall be supplied to each principal in the county and the superintendent shall supply a copy to any person who requests it.

Section 12. These rules and regulations shall be in full force and effect immediately upon adoption by the Board.

NOTE: Further specific action by the board on the basis of the general policies contained in the general rules and regulations will in most cases be needed.

EDUCATION
Public Schools—Kentucky

Acting on the recommendations of a bi-racial citizens committee, the Board of Education of Christian County, Kentucky, on August 24, 1956, announced its plan to delay integration of schools in that county until the 1957-58 school year. The announcement follows:

During the school year of 1955-56 the Christian county board of education appointed an integration committee of ten white and five Negro citizens of the county to study the problem of desegregation and report its recommendation to the board.

The committee, after studying the many factors and problems involved, reported that it has not finished its work and recommended "that the Christian county school board proceed for the 1956-57 school year as it is now set up, and that the school board begin integration in the year 1957-58 and that the board work out where integration shall begin after a study of the many problems that may arise."

The school board expresses its appreciation to the members of the integration committee for their time already spent in studying the problems and for their continual efforts to work out a practical and reasonable program which will comply with the decision of the United States Supreme Court of May 17, 1954, and its implementing decision of May 31, 1955.

The Christian County Board of Education voted to accept the recommendations of the integration committee to initiate a program of desegregation during the school year of 1957-58. It is felt that is the earliest practical date to institute necessary changes.

EDUCATION
Public Schools—Kentucky

The Hopkins County, Kentucky, Board of Education has announced the following plan for voluntary integration of the schools of that county. The plan calls for integration of first grades in September, 1956, and for stepping up one grade each year.

WHEREAS this Hopkins County Board of Education has, with the assistance of its properly trained staff and aided by the reports of the public committees as herein set forth, proceeded to study all problems now existing or which might foreseeably arise, resulting from the integration of the races in the public school system of Hopkins County; said Board, armed with its inherent, peculiar knowledge of the many problems, including transportation, physical plant, instruction personnel, and geographic pupil-load, to say nothing of its limited financial resources, and being ever desirous of maintaining its jealously guarded reputation both as a Board and as individuals thereof, for abiding with the spirit of the law, as announced by the Supreme Court, as well as the letter thereof, and also being ever mindful of its public obligation to achieve an orderly, feasible and fair transition from a segregated to an integrated school system so to accomplish, with reasonable dispatch, at the minimum of public unrest and disorder, said integrated system, and with a spirit guided by a sense of justice, respect for law, awareness of difficulty, and with recognition of the necessity for a fair and just decision, does ordain as follows:

NOW THEREFORE BE IT RESOLVED THAT:

1. Beginning with the school year September, 1956, there shall be established a voluntary program of integration of the races for all students, white or colored, desiring to participate therein, in the first grades in all grammar schools of the entire school system, same to continue annually so that at the termination of twelve years total integration for those of either race desiring to participate will have been fully and finally achieved.

2. That all schools operated by the system in and during the school year September, 1955, to

June, 1956, will continue to be operated as now constituted for the school year September, 1956, to June, 1957, and thereafter as need exists therefor in the Board's discretion at said time.

3. All of the above being subject, however, to the Board's inherent and lawful right to balance its pupil-load according to the capacities of its physical plants and facilities.

EDUCATION

Public Schools—Maryland

The Superintendent of Education of the State of Maryland has issued the following "Progress Report on Desegregation in Maryland Public Schools as of May 30, 1956." The years indicated are for the school year beginning September 1.

Progress Report on Desegregation in Maryland Public Schools [by Counties]
as of May 30, 1956

Allegany
1955 Voluntary transfers at elementary and senior high level
1956 Voluntary transfers extended for same groups

Anne Arundel
1955 Citizens' committee
Voluntary transfers to classes for severely handicapped
1956 Voluntary transfers extended to grades 1-3 inclusive in all schools

Baltimore City
1954 Voluntary transfers to all schools with limitations in crowded schools
1955 Voluntary transfers extended under same conditions
1956 Voluntary transfers extended under same conditions

Baltimore County
1955 Voluntary transfers to 28 schools
1956 Voluntary transfers extended to include 25 additional schools

Calvert
1955 Citizens' committee

Caroline

Carroll
1955 Citizens' committee
Voluntary transfers with limitations in crowded schools
1956 Voluntary transfers extended under same conditions

Cecil
1955 Voluntary transfers with limitations in crowded schools
1956 Voluntary transfers extended under same conditions

Charles
1955 Citizens' committee

Dorchester
1955 Citizens' committee

Frederick
1955 Citizens' committee
1956 Citizens' committee recommended desegregation effective September 1, 1958, subject to facility limitations

Garrett
No Negro pupils

Harford
1955 Citizens' committee
1956 Voluntary transfers with limitations in crowded schools

Howard
1955 Citizens' committee
1956 Voluntary transfers to grades 1-5 inclusive with limitations in crowded schools

Kent
1955 Citizens' committee
1956 Voluntary transfers with limitations in crowded schools

Montgomery
1954 Citizens' committee
1955 Four Negro elementary schools closed

and pupils assigned to formerly all-white schools
Voluntary transfers to suburban area schools according to district, with limitations in crowded schools
Junior college desegregated
1956 Voluntary transfers extended to other schools under the same conditions

Prince George's
1954 Citizens' committee
1955 Voluntary transfers with limitations in crowded schools
1956 Voluntary transfers extended under same conditions

Queen Anne's
1955 Voluntary transfers with limitations in crowded schools
1956 Voluntary transfers extended under same conditions

St. Mary's
1955 Citizens' committee

Somerset
1955 Citizens' committee

Talbot
1955 Citizens' committee
1956 Voluntary transfers to all schools. Applications have already been received.

Washington
1955 Citizens' committee
Voluntary transfers to all schools outside Hagerstown
1956 Voluntary transfers extended to grades 11 and 12 in Hagerstown

Wicomico
1955 Voluntary transfers with limitations in crowded schools
1956 Voluntary transfers extended under same conditions

Worcester
1955 Citizens' committee

EDUCATION

Colleges and Universities—Georgia

On May 9, 1956, the Board of Regents of the University System of Georgia adopted a resolution setting up additional requirements for admission to public colleges and universities in that state. The additional requirements include the submission of certificates from two Georgia citizens who are alumni of the institution to which admission is sought attesting to the moral character and reputation of the applicant for admission. That resolution follows:

RESOLVED by the Board of Regents of the University System of Georgia that the resolution adopted by the Board on April 8, 1953, which pertains to requirements for admission to institutions of the University System of Georgia, and which appears on pages 12, 13 and 14 of the minutes of the meeting of the Board of Regents of April 8, 1953, be, and the same is hereby amended to read as follows:

RESOLVED, That the requirements for admission to the various institutions of the University System of Georgia be amended so that the following additional requirements must be met:

1. Any resident of Georgia applying for admission to an institution of the University System of Georgia shall be required to submit certificates from two citizens of Georgia, alumni of the institution that he desires to attend, on prescribed forms, which shall certify that each of such alumni is personally acquainted with the applicant and the extent of such acquaintance, that the applicant is of good moral character, bears a good reputation in the community in which he resides, and, in the opinion of such alumnus, is a fit and suitable person for admission to the institution and able to pursue successfully the courses of study offered by the institution he desires to attend.
Provided, however, that any applicant who seeks admission to an institution with an enrollment of less than 1,000 students and who lives in a county in which no alumnus of the institution he wishes to attend resides, may furnish a

certificate from the Judge of the Superior Court of his circuit in lieu of the certificate from alumni. In such a case the certificate of the Judge of the Superior Court shall set forth the same facts that the alumni certificate must contain in other cases.

Each such applicant shall also submit a certificate from the Ordinary or Clerk of the Superior Court of the county in which the applicant resides that such applicant is a *bona fide* resident of such county, is of good moral character and bears a good reputation in the community in which he resides. However, any applicant who lives in a county having a population of 100,000 or more, may submit in lieu of the certificate from the Ordinary or Clerk of the Superior Court a certificate, on a prescribed form, from a third alumnus of the institution that applicant desires to attend. This third alumnus shall be one of those on a list of alumni designated by the president of the alumni association of the institution to assist the institution in its efforts to select students of character, aptitude, and ability and to obtain corroborating evidence regarding the place of residence of such students. The certificate of the third alumnus in counties with a population of 100,000 or more shall set forth the facts required in the certificate from the Ordinary or Clerk of the Superior Court.

2. Any non-resident of the State applying for admission to an institution of the University System of Georgia shall submit a similar certificate from two alumni of the institution that he desires to attend, or from two reputable citizens of the community in which the applicant resides.

   Every such applicant shall also submit a certificate from a judge of a court of record of the county, parish or other political sub-division of the State in which he resides that he is a *bona fide* resident of such county, parish or other political sub-division and a person of good moral character and bears a good reputation in the community in which he resides.

3. There is reserved to every institution of the University System of Georgia the right to require any applicant for admission to take appropriate intelligence and aptitude tests in order that the institution may have information bearing on the applicant's ability to pursue successfully courses of study for which the applicant wishes to enroll and the right to reject any applicant who fails to satisfactorily meet such tests.

4. There is reserved to every institution of the University System of Georgia the right to determine the sufficiency of any certificate required by this resolution; the right to determine whether any applicant has met the requirements for admission as set forth by this resolution, or otherwise, and is a fit and suitable person for admission to such institution. There is also reserved the right to reject the application of any person who has not been a *bona fide* resident of Georgia for more than twelve months.

5. If it shall appear to the president or other proper authority of any institution of the University System of Georgia that the educational needs of any applicant for admission to that institution can best be met at some other institution of the University System, he may refer the application to the Board of Regents for consideration for reference or assignment to such other institution.

6. This resolution shall become effective immediately and catalogs of all institutions of the University System shall carry these requirements. Catalogs already printed shall carry inserts or addenda showing these requirements. The foregoing requirements shall apply to all applicants who have applied for admission to any institution of the University System of Georgia, but have not been actually enrolled and admitted, and to all applicants who hereafter make application for admission to any such institution.

EDUCATION

Colleges and Universities—Louisiana

Questions having arisen with respect to the interpretation of certain recently enacted Louisiana legislation (see pp. 731, 947, and 953) and its effect on the treatment of Negro students enrolled in Louisiana State University (see 1 Race Rel. L. Rep. 101), the president of that institution presented a list of such questions to the Board of Supervisors of the university. The Board voted on September 1, 1956, to accept as controlling regulations the following answers to those questions as recommended by its legal counsel.

QUESTIONS

1. Shall Negro students be permitted to live in University dormitories?
   A. **Yes.**

2. If answer to No. 1 is yes: Shall Negro students be assigned rooms in segregated sections of dormitories and not permitted free election as to type and location of rooms? (Examples: suites, 2 student rooms, rooms with private baths, with communal baths).
   A. **No.**

   Shall Negro students residing in dormitories be assigned to bathrooms separate from white students?
   A. **No.**

3. Shall Negro students be permitted to eat in University cafeterias, coffee shops, and dining halls?
   A. **Yes.**

4. If answer to No. 3 is yes, shall Negro students be required to eat in separate dining areas and use china, silver and other utensils kept separate for Negroes?
   A. **No.**

5. Shall Negro students be served in the Field House Coffee Shop?
   A. **Yes.**

6. If answer to No. 5 is yes, shall they be seated and served in a segregated section and required to use utensils kept separate for Negroes?
   A. **No.**

7. Shall Negro students be permitted to use restrooms in the classroom buildings which are used by white students, faculty and staff?
   A. **Yes.**

8. Shall Negro students be permitted to use drinking fountains which are used by white students, faculty and staff?
   A. **Yes.**

9. Shall Negro students be seated in separate sections at athletic events?
   A. **Yes.**

10. If answer to No. 9 is yes, shall the separate sections for Negro students be a part of the section reserved for Negro spectators generally?
    A. **No.**

11. At such campus events as student convocations, college convocations, plays, musical programs, lectures, etc., shall Negro students be seated in segregated sections of the auditoriums?
    A. **Yes** (if entertainment.) **No.** (if educational).

12. Shall Negro students be permitted to attend with white students such meetings as YMCA and YWCA?
    A. **No** (if social). **Yes** (if educational).

13. Shall Negro students be permitted to attend meetings held on the campus by organizations of which they and white students are members when refreshments are served? (Examples: class meeting of graduate students in College of Education, conference on child care to which all graduate students enrolled in courses in child care are invited)
    A. **No** (if social). **Yes** (if educational).

14. Shall Negro students be permitted to attend meetings of learned societies held on the University campus?
    A. **Yes.**

15. Shall Negro students be eligible for membership in honor societies where invitation to membership is based on scholastic attainment?
    A. **Yes.**

16. If answer to No. 14 is yes, shall a Negro member of an honor society be permitted to attend the organization's annual banquet?
A. **No.**

17. Shall Negro students be permitted to attend University-wide dances for all students?
A. **No.**

18. Shall Negro students be permitted to use the swimming pool?
A. **No.**

19. At Commencement Exercises shall Negro graduates be seated separately and have their degrees awarded separately?
A. **No.**

20. At Commencement Exercises shall Negro parents and friends of graduates be seated in segregated sections?
A. **Yes.**

21. Shall the University prohibit integrated meetings and social activities held in religious student centers located on property leased from the Unversity?
A. **Yes** (if social). **No** (if religious).

GOVERNMENTAL FACILITIES

Parks—Maryland

On November 29, 1955, the Commission of Forests and Parks of the state of Maryland adopted a motion as follows: "That the Commission of Forests and Parks go on record as accepting for immediate implementation the directive of the Supreme Court with respect to integration." On November 18, 1955, the Department of Recreation and Parks of the City of Baltimore issued the following statement:

Statement on integration board of recreation and parks Baltimore, Maryland, November 18, 1955.

At an Executive Meeting of the Park Board held this morning the question of integration in our public parks and recreational activities, in connection with the recent Supreme Court Decision, was thoroughly discussed. It was unanimously decided that public parks and recreational facilities be henceforward operated on an integrated basis.

UNANIMOUS CONSENT.

EMPLOYMENT

Fair Employment Practices—New York

AMERICAN JEWISH CONGRESS, a membership corporation v. John Warren HILL, Presiding Justice, Domestic Relations Court of the City of New York, et al.

New York State Commission Against Discrimination, Case No. C-3734-55.

SUMMARY: The American Jewish Congress brought a complaint under New York's "Law Against Discrimination" against the presiding justice of the New York City Domestic Relations Court, that Court, and officials of the City before the State Commission Against Discrimination alleging violations of the state statute in the appointment and employment of probation officers for that court. The state statute concerning probation of children requires that, "when practicable", the probation officers shall be of the same religious faith as the child placed under his supervision. It was alleged that prospective court appointees were being questioned as to their religious creed. On the question of standing to bring the complaint, the investigating commissioner held that the American Jewish Congress did not have standing as to the alleged prior violations but did have standing to complain as to possible prospective illegal action. Although

the commissioner found probable cause to credit the allegations of the complaint, on agreement by the respondents to discontinue the alleged discriminatory practices no order was issued.

CONWAY, Investigating Commissioner.

Complainant herein charges Respondent with unlawful discrimination, based upon creed, in appointment and employment of probation officers for the Domestic Relations Court of the City of New York. The facts are not in dispute. Judge Hill, as the appointing officer, selects and appoints probation officers from lists certified to him by the Personnel Director of the City of New York. At some point prior to the filing of this complaint, he requested, and the Personnel Director certified, such eligibles as belong to the particular creed of the former incumbent of the vacancy to be filled. His purpose in requesting this selective certification was to maintain on his staff, the same proportionate number of adherents to each of the three major faiths as is represented in the case load of the Court.

It was the position of the Respondents that Section 25 of the Domestic Relations Court Act requires such appointments because it provides in part:

> "When practicable a child placed on probation shall be placed with a probation officer of the same religious faith as that of the child. ———————————"

Complainant contends, in substance, that Section 25 of the Domestic Relations Court Act refers to, and is limited to, the assignment of cases and not to the appointment of the probation officers to whom such assignments are later made. It asserts that the practice followed is unwarranted by statute and in violation of the Law Against Discrimination.

[*Question of Standing*]

Before reaching the issue thus presented it is necessary to ascertain whether the Complainant herein is authorized to file a complaint pursuant to Section 297 of the Executive Law under subdivision 1 (a) of Section 296, on the facts herein, that is to say: whether Complainant is a "person claiming to be aggrieved" within the meaning of the Section.

Are these words of art? If so, their meaning lies in the decisions.

Pouch vs. Prudential Insurance Co., 204 N.Y. 281 at 288:

> "Statutes are presumed to be enacted by the legislature with knowledge of the decisions of the courts construing the language used therein unless it expressly appears that the construction given by the courts was not intended."

Obviously the mere assertion or "claiming" to be a person aggrieved is not sufficient to give this Commission jurisdiction. The claim here contemplated is one which must have a reasonable basis on which to rest. As was said in Williams vs. Aetna Life Ins. Co., 8 S. Rep. 567:

> "- - - a mere assertion of claim by another without alleging anything whatever on which to base it, is not enough."

If, therefore, Complainant is not a person aggrieved within the meaning of Section 297 of the Executive Law, its action in claiming to be aggrieved cannot confer jurisdiction.

[*Meaning of Phrase*]

What then is meant by the phrase "person aggrieved" as used in the Statute under consideration?

It will not do to adopt the meaning ordinarily ascribed. The definition given by the dictionary, i.e.:

"Troubled or distressed; having a grievance"; does not apply, for even there the definition used in law is noted, as:

> "Specifically Law, adversely affected in respect of legal rights; suffering from an infringement or denial of legal rights." (Webster's New International Dictionary, Second Edition, Unabridged.)

Moreover, legal terms used in a statute are presumed to have been used in their legal sense.

> "Words having a precise and well settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended. (Stephenson

vs. Higginson, 3 H.L. 688)." Perkins vs. Smith, 116 N.Y. 441.

To the same effect: Bell vs. Terry & Tench Co., et al., In re Travelers Ins. Co., 163 N.Y.S. 733; Ehrsam vs. City of Utica, 55 N.Y.S., 942, 943; Skeels vs. Paul Smith Hotel, et al., 185 N.Y.S. 665.

In re McGlone's Will 171 Misc., 612, (13 N.Y.S. 2d. 76), where Surrogate Wingate wrote:

> "As has hereinbefore been indicated, the word 'agreement' possesses a well defined meaning in the law and it is an established principle of statutory construction that in such a situation its technical connotation must be accorded to it in the absence of unmistakeable demonstration of a contrary intention."

The phrase "person" or "persons aggrieved" is by no means new to the law. It has been defined repeatedly and must be taken to have a well settled meaning. Ballentine's Law Dictionary defines "aggrieved" as:

> "The condition of one whose legal right has been invaded by the act complained of. A party aggrieved is one whose pecuniary interest is directly affected by the decree; one whose right of property may be established or divested by the decree. See 25 L.R.A. (N.S.) 155, note. As affecting a party's right to appeal or sue out a writ of error, an 'aggrieved' person is not one who may happen to entertain desires on the subject, but only one who has rights which may be enforced by law, and whose pecuniary interests might be established in whole or in part by the judgment. In other words, the mere fact that a person is hurt in his feelings, wounded in his affections, or subjected to inconvenience, annoyance, discomfort or even expense by a judgment, does not entitle him to appeal from it, so long as he is not thereby concluded from asserting or defending his claims of personal or property rights in any proper court. But one whose pecuniary interest is directly affected by the judgment or whose right or property may be divested thereby, is to be considered a party aggrieved. See Am. Jur. 945." [sic]

Bouvier's Law Dictionary, states it as follows:

> "Aggrieved: Having a grievance; or suffered loss or injury. The 'parties aggrieved' are those against whom an appealable order or judgment has been entered; Ely vs. Frisbie, 17 Cal. 260. One cannot be said to be aggrieved unless error has been committed against him; Kinealy vs. Macklin, 67 Mo. 95; Wiggin vs. Sweet, 6 Metc. (Mass) 197, etc."

Black's Law Dictionary gives the definition:

> "Aggrieved: Having suffered loss or injury; damnified; injured. A person is 'prejudiced' or 'aggrieved' in the legal sense, when a legal right is invaded by an act complained of or his pecuniary interest is directly affected by a decree or judgment. Gloss v. People, 859 Ill. 332; 102 N.E. 763, 766, Ann. Cas. 1914 C, 119; Wadsworth v. Cozad, 175 N.C. 15, 94 S.E. 670, 671."

In re: Dimentstein, 50 N.Y.S. 2d. 448, 451, (Aff'd. 225 App. Div. 722) defines "aggrieved" in this language:

> "'Aggrieved' means one who is prejudiced; one having a substantial grievance; a denial of some personal or property right; and to file objections it would seem that the objector must have an interest in the subject matter."

See also Michael M. Dolphin, an attorney, respondent; The Association of the Bar of the City of New York, Appellant, 240 N.Y. 89, 93, wherein the Court held that the Bar Association could not appeal from the decision in disciplinary proceedings, saying:

> "As we have said, that was the course which was taken in the present case and the question is whether by the decision of the Appellate Division adverse to the claims of the Association the latter has been 'aggrieved' so that within the provisions relating to appeals it has the right to appeal to this court, assuming that otherwise a cause for such appeal exists.
>
> "We think that the negative answer must be given to this question. While we appreciate that in its efforts to uphold the standards of the profession the Association is interested if an erroneous decision has been made refusing to discipline a member of the profession when he deserved it, we think

that this interest is of a general character such as theoretically is shared by every member of the profession and that it is not such a specific, personal and legal interest as makes the Association a party legally aggrieved within the meaning of our statutes. - - - - Thus it is in no legal sense a party asserting rights which if granted will be beneficial to it and a decision adverse to its views does not lessen, impair or destroy any of its rights but effects only that interest which every member of the profession, and the entire community for that matter, has in the proper discharge by attorneys of the duties and responsibilities conferred upon them. In all of these features we see an entire lack of character as a party and an entire absence of legal interest based either upon alleged rights or upon a right and obligation to discharge certain official duties, (People ex rel. Burnham vs. Jones, 110 N.Y., 509), and the denial of which rights would present that situation of being aggrieved which would sustain an appeal. The duties which it discharges are rather in the interest of professional uprightness and public welfare than in the assertion of peculiar or personal rights and privileges, and, therefore, they end in a case such as this when on presentation by it of all the facts the Court to which is confided disciplinary powers deems it unwise to exercise them."

Surely, in this enlightened age, revulsion is the common reaction of all right-thinking people in the community when confronted with discrimination based upon race, color, creed or national origin. That is not the reaction demonstrated by Complainant exclusively.

The laudable purposes for which Complainant was organized and the zeal with which its officers and staff pursue its objectives, properly lead to a keen interest in the eradication of illegal discrimination. Its interest has greatly advanced the cause of social justice and often strengthened the arm of this Commission. But that interest is not such a specific, personal and legal interest as to constitute it a "person aggrieved" within the meaning of the statute.

Nor is this a startling innovation. Where the recovery of a penalty by a "person aggrieved" was provided by a statute (Real Property Law, Section 442-E, subdivision 3), the Court said:

"Fairly construed, the legislative intent of this Statute - - - - extends only to such persons as are immediately and proximately injured by the very act prohibited and their privies." Meyer vs. Stein, 161 Misc., 91. See also: Meyer vs. Brooklyn Heights R.R. Co., 41 N.Y.S. 798; Application of Burns 200 Misc. 355; Bull vs. N. Y. City Railway Co., 192 N. Y. 361; Williams vs. Rice, 201 N.Y.S. 43; In re: Fleming 228 N.Y.S. 544 (Where relatives sought to set aside adjudication of incompetency); Isham vs. N. Y. Association for Poor, 177 N.Y. 218.

Obviously the complainant corporation is not, and cannot become, an eligible for appointment to the position of Probation Officer and therefore it cannot complain of a grievance which is not its own. (Clark vs. Kansas 176 U.S. 114, 118; Smiley vs. Kansas, 196 U.S. 447; Interstate Commerce Commission vs. Chicago, Rock Island and Pacific Railway Company 218 U.S. 88).

This construction is not at variance with the prevailing view expressed during the public hearings prior to the adoption of the Law against Discrimination.

[*Legislative History*]

The minutes thereof show that no less than twenty-nine speakers, representing many organizations interpreted the wording to exclude organizations from filing "employment complaints". Among them were able lawyers, civic leaders, public officials, labor leaders and social workers. Several of them strongly recommended that the broad language of the Labor Relations Law, (Section 705), be adopted. (Minutes Vol. II, pp. 697, 698, 699; Vol. III pp. 1276, 1277; Vol. III, pp. 1330, 1331). The Committee clearly narrowed the issue to the meaning of the word "Aggrieved". (Vol. III, p. 1193).

At one point Counsel for the Committee engaged in a colloquy which turned on the definition of the word "person", as follows:

"**MR. ROSS:** We feel that a recognized group should be permitted to file a complaint on behalf of such group, or on behalf of a particular individual, if discriminated against, ..."

"**MR. TUTTLE:** Because I think you have a misapprehension as to meaning of words "any person". You interpret that as mean-

ing any individual, whereas, if you turn to page 3, you will see under the term 'Person' in Section 127, dealing with definitions, that it says: 'The term 'person' includes one or more individuals.' Consequently, under this bill as it stands, a group of persons or individuals, feeling that they are discriminated against because of race, creed, color or national origin, will have a right unquestionable under that definition to file a complaint." (Minutes Vol. I, pp. 340, 341, 342).

The Committee Counsel had not directly met the issue presented as was pointed out by the following:

"**MR. WEISS:** May I stop here just a moment in my prepared statement. I think you made the statement this morning when you were speaking about the employer, that the definition of the word "person" had a wider concept than referring to an individual. And in referring to persons, the word 'person' was defined as including more than an individual. My worry, sir, in meeting your point is with the word 'aggrieved'. If the person must be aggrieved, then it is not enough that the definition of 'person' may be more than individual, and so if, you will permit me I will go on and expand on that thought. ....."
(Minutes Vol. II, pp. 697, 698, 699).

When Counsel's position remained unclarified, the issue was again raised and he then left no doubt about his views:

"**MR. SACHER:** . . . . . Consequently, I feel that there should be opportunity to anybody to come in with a complaint, apart from the considerations which I know have already been urged upon you, namely, the fears of employees to file such complaints which are legitimate, just as they are in the Labor Relations; but I say, in view of the fact that this statute is not designed to create so-called personal rights, but it is designed rather to further and fulfill public purposes, bearing in mind that the elimination of discrimination is not simply the redress of a public right, but the furtherance of a public purpose, I maintain that there should be the opportunity to anybody to complain and report and have action upon the complaint, or the representative of any person who reports a violation of law. ...."

"**MR. TUTTLE:** Let me ask you this, so I can understand what you are suggesting. Are you suggesting that the statute should be so drawn that any organization which might be hereafter formed, of two, three or four, or more people, could go around to any business in the community, and knowing that they did not employ—that they were not employing members of some particular group, immediately file a complaint with the commission on that basis, and if you do mean that, do you think the community for one instance would stand for such procedure as that, because I can conceive of hundreds of organizations feeling this is a mighty fertile field, and would spring up and go around to all our honorable business men and say, 'See here, unless you agree to employ a certain number of people in a certain group, or in two or three groups, we will report you to the Commission.' You know what would lead to, as a good citizen."

Mr. Sacher then replied asserting that he saw no basis for any such fear and Mr. Tuttle resumed the statement of his position:

"**MR. TUTTLE:** One reason for giving that some thought is that we want a statute which will stand up in public opinion, and not fall into ill repute, and it does seem to me worthy of consideration, at least if that is your point, that volunteer organizations, self appointed policemen, even if they had no ulterior motive, going around from door to door in our business communities and dictate or threaten that they would carry things to the State Commission, my feeling is that there would be a reaction against the enforcibility of this bill."

In his further discussion, Mr. Tuttle cited the Prohibition amendment and his experience in enforcement to underline the necessity for public acceptance and support of this legislation. (Vol. II, pp. 898 to 903, incl.).

At the time of the adoption of this Statute there was grave concern and even timidity on the part of many as to the willingness of the public to give support to it. The possibility of repudiation thereof and consequent disaster to the cause of equality of opportunity inspired caution on the part of the proponents. Retrospectively we know that public acceptance and support was ready and waiting, but we cannot change the words that would have been used in the statute had the framers known the fact. Furthermore, the issue has been before the Legislature as recently as 1954 and 1955, when amendments to Section 297 were proposed but not adopted. (A. Int. 276, Pr. 276; S. Int. 316, Pr. 316; January 12, 1954; A. Int. 2591, Pr. 2760; S. Int. 2847, Pr. 2982, February 22, 1955).

[*Practical Construction*]

This interpretation is consistent with the practical construction placed upon Section 297 by the Commission itself, which for almost ten years of its existence, has never heretofore entertained an "employment complaint" from Complainant or any other similar recognized organization in the field of human relations. As was said in Bullock vs. Cooley 225 N.Y. 566, 571:

> "Much weight should be given to the practical construction of a Statute by the officers whose duty it is to enforce it." (Cases cited)

That this question has not arisen repeatedly in the past, may be taken as an acceptance and adoption of the construction by the public and the agencies mentioned.

> "A practical construction given a statute by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in and approved by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind." (Cases Cited) Hennessy vs. Personal Finance Corp. 176 Misc. 201.

There is, however, no ambiguity in the language here. The Statute says: "Any person claiming to be aggrieved by an unlawful discriminatory practice may, by himself or his attorney-at-law, make, sign and file with the Commission a verified complaint in writing - - -". (Section 297 Executive Law).

> "The great object of the maxims of interpretation is, to discover the true intention of the law; and when that intention can be indubitably ascertained, and it be not a violation of constitutional right, the courts are bound to obey it, whatever may be their opinion of its wisdom or policy. 1 Kent. Com. 468.

So it was stated in People vs. The New York Central Railroad Co. 13 N. Y. 78, 80:

> "In considering all written language, the first object is to ascertain its meaning. A statute is the declared will of the legislative power. If its language is plain and unambiguous, there is no room for construction. It must be applied to all cases coming within it - - - -".

The Section herein refers to the "person" (which is defined in Section 292), "himself" or his "attorney-at-law", the "Industrial Commissioner" and the "Attorney General". This particularity of specification may well invoke the doctrine of "Expressio unius est exclusio alterius" and thereby exclude all others. (Jackson vs. Citizens Casualty Co., of N. Y., 252 App. Div. 393; Aultman and Taylor Co., vs. Syme 163 N.Y., 54, 57.) These avenues, however, provide ample opportunity for the protection of the public.

[*Proper Complainants*]

In each instance of the certification of eligibles from the list for appointments to the position of Probation Officer, the person or persons aggrieved by the practice pursued are identifiable. They consist of each and all persons whose names have not been so certified because of creed. All others, (except the Attorney General and the Industrial Commissioner in proper cases), are volunteers to whom the right to complain formally has not been extended.

The position of Probation Officer is a competitive class position to which appointments must be made from those graded highest in open competitive examinations. (Section 14, Subdivision 8, Civil Service Law). Each appointment must be made by selection of one of the three persons who are willing to accept and are graded highest on the most nearly appropriate

eligible list. (Rule VIII, Rules of Civil Service). Each person whose name is passed over and not certified in order to reach another of lower grade, has reasonable basis for claiming to be aggrieved in that he has not been considered for appointment. For such persons the section was written.

To recognize Complainant as a proper person to file a complaint, where it does not act in behalf of any person passed over on the eligible list would require that violence be done to the clear language and intent of the Section. Words cannot be inserted. The well established rule has existed from early times.

"Every day", said Patteson, J., in King vs. Burrell, 12A & E 468, "I see the necessity of not importing into statutes, words which are not to be found there. Such a mode of interpretation only gives occasion to endless difficulties."

So, in Everett and Mills, 4 Scott, N.C. 531, Tindale, C. J., said:

> "It is the duty of all courts to confine themselves to the words of the legislature; nothing adding thereto; nothing diminishing. We must not import into an act a condition or qualification which we do not find there."

People vs. The New York Central R. R. Co. (supra), and cases there cited take the same position.

I cannot refrain from observing that the Legislature might well consider amending the Statute to include this complainant and similar organizations as persons authorized to file complaints. Such a course commends itself as reasonable and holding great promise of efficacy in the advancement of the cause of equality of opportunity. However, the power to do so rests there and not with this administrative agency.

The complaint so far as it charges violation of subdivision 1 (a) of Section 296 is dismissed for lack of jurisdiction.

[*Future Action*]

Complainant also alleges a violation of subdivision 3 (now subdivision 4) of Section 296 in that respondents, as a matter of established policy, make unlawful inquiries as to the creed of prospective appointees in violation of subdivision 1 (c) of Section 296. Its position in this respect is quite different. No one can now say how many eligibles, in the future, will be excluded from employment because of their creed. Nor is it possible to identify any of the persons who may compete in the future and become eligible for consideration.

In this area the statute is prospective and empowers the Commission to prevent illegal discrimination. This Commission has taken the position that a complaint may be filed by any person or organization under subdivision three. (American Jewish Congress vs. American Lumberman's Casualty Company of Illinois, Case No. 1189-45, Decision of Commission Against Discrimination. September 20, 1946)

Whether an illegal inquiry as to creed appears upon a printed application blank or is made orally is of no consequence for either procedure violates subdivision 1 (c) of Section 296. The complaint herein must be treated as a request to this Commission to investigate the charge made by verified complaint and to take such remedial steps as will eliminate any unlawful inquiries found to be part of the recruitment procedure. In this respect we act in the public interest in carrying out the legislative mandate, rather than in the judicial capacity of adjudicating a controversy between a person aggrieved and a respondent employer. Were we to hold that we are without jurisdiction under subdivision three of violations of subdivision 1 (c), it would be tantamount to saying that that subdivision was nullity since the victims of such violations are unidentifiable. In such cases the discriminatory practice is aimed at the public generally and ours is the duty to protect the public to the extent and in the manner provided by law, against discrimination which the legislature has found to be a menace to the institutions and foundation of a free democratic state.

[*Practice Illegal*]

We come then to the issue as to whether the admitted facts constitute a violation of subdivision 1 (c) of Section 296. Unless the inquiries made in relation to creed constitute a bona fide occupational qualification they must be deemed to be a violation of the subdivision.

Respondents' contention that Section 25 of the Domestic Relations Court Act of the City of New York requires appointments to be made in the manner adopted and that therefore the inquiry constitutes such qualification cannot be sustained. The Section makes no mention of appointments and concerns assignments of pro-

bation officers only. It is not in conflict with the provisions of the Law Against Discrimination. The Legislature directed that assignments be made on the basis of creed "when practicable". Obviously they anticipated occasions when it would not be practicable and so provided for that eventuality. Nor did they require that smaller jurisdictions have representation of various creeds among probation officers under other similar statutes. Nowhere else in the State has creed been deemed to be an occupational qualification. Neither the purposes nor the techinques of probation work are different in the City of New York than elsewhere.

[*Queries as to Religion*]

In the adoption of subdivision 1 (c) of Section 296, the Legislature was explicit in making unlawful any pre-employment inquiries concerning applicants' creeds. Therein they made it unlawful for any employer "to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color or national origin," or any intent to make any such limitation. The inquiries directed to the eligibles on the list of candidates for probation officer for the Domestic Relations Court of the City of New York, concerning creed are prohibited by that section.

Such inquiries, however, are not barred after appointment and the Court may properly ascertain the religious faith of its probation officers once they are employed. This enables the Court to comply with the legislative direction contained in Section 25. If it appears that the candidates for the vacancies are predominately of one creed, it can only be assumed that the legislature intended, by using the words "when practicable," to provide for such contingency.

The purpose of Section 25 and the contention of Respondents strongly appeal to one who has seen the powerful influence which religion and morality has had in rehabilitation of delinquent children. Respondents' only concern herein has been the welfare of those on probation and it would be most unfortunate if probation officers, through lack of knowledge of a particular faith, were to fail to make full use of this source of invaluable assistance. There should be no concern, however, that mere difference of religion would work to the detriment of the child. In all probability, such a result could be brought about only by affirmative acts or flagrant neglect on the part of the probation officer, either of which would make him subject to discipline or removal.

[*Solution Legislative*]

It may well be that in the future, impracticability of complying with the desire expressed in Section 25, may lead to unsatisfactory results in probation work. The solution, in that event, lies with the legislature. We cannot anticipate that outcome and "amend" the statute through the process of strained construction.

During the pendency of this proceeding conferences have been held with Judge Hill and Personnel Director Schechter. I have been informed that the Personnel Director and the New York City Civil Service Commission have abandoned the practice of inquiring into the religious creed of eligibles for Probation Officer positions. This step has been taken voluntarily. Judge Hill has informed me that no eligible on the probation officer list has been refused appointment for the past several years because the number of vacancies has consistently exceeded the number of eligibles seeking appointment and this, respondents allege in their answer. However, this has been the result of recruitment problems only and in the reverse situation, Judge Hill has stated that he would follow the policy of appointing according to creed.

[*Civil Service Law Application*]

In their Fourth Separate Affirmative Defense respondents assert that persons alleging discrimination in regard to positions in the Civil Service should be required to resort to the provisions of Section 14-b of the Civil Service Law. The section in question does not, however, provide an exclusive remedy, and resort to the Law Against Discrimination is an alternate remedy.

Such defense also asserts that the term "employer" as used in Section 292, subd. 5, of the Law Against Discrimination exempts municipal corporation, and therefore the City of New York, from the provisions of the law. This position is untenable. Article 1 Section 11 of the New York State Constitution; Op. of the Atty. Gen. dated February 14, 1946 in Ross vs. New York City Department of Hospitals.

In a supplemental complaint verified on May 24, 1956, Complainant charges, among other

things that Respondent, Judge Hill, has continued to make pre-employment inquiries in relation to creed, has refused to appoint eligibles from the probation list certified to him by the City Civil Service Commission because they are Jews and continues to retain provisionals "illegally."

My investigation establishes the fact that such pre-employment inquiries have been so made, but it is also the fact that no person has been denied appointment as probation officer because of religious affiliation. Every qualified person whose name has been certified to Judge Hill, has been appointed and vacancies still remain. Whatever may be the legal status of provisionals retained as determined under the provisions of the Civil Service Law, the Court must continue to operate and the retention of such provisional employees is not a violation of the Law Against Discrimination.

There is probable cause to credit the allegations of the complaint as to the violation of subdivision 1 (c) of Section 296.

[*Agreement to Discontinue*]

Respondents Joseph Schechter, as Commissioner and as Personnel Director of the City of New York, and George Gregory, Jr., and Anthony M. Mauriello, as members of the New York City Civil Service Commission, have agreed that they will continue to maintain the policy now in effect in relation to candidates and eligibles for the position of probation officer in that they will not authorize or permit inquiries designed to elicit information as to the creed of said candidates or eligibles and that they will not certify such eligibles on the basis of creed nor comply with any request heretofore or hereafter made to them, so to do.

Respondent John Warren Hill, Presiding Justice of the Domestic Relations Court of the City of New York has agreed that he will not request said Personnel Director or Civil Service Commission to certify eligibles for probation officer positions on the basis of creed, nor make, authorize or permit any inquiry designed to disclose the creed of any candidate or eligible for appointment as probation officer, prior to the appointment of such person; and that all such appointments hereafter made shall be made without regard to the creed of the applicant.

In accordance with Rule 4 of the Rules Governing Practice and Procedure before the State Commission Against Discrimination, the complainant has the right to apply to the Chairman for a reconsideration of the decision on this complaint. If such application is made, it must be in writing, state specifically the grounds upon which it is based and must be filed within 15 days from the date of the mailing of the notice of disposition in the office of the Commission where the complaint was previously filed.

EMPLOYMENT

Labor Unions—Ohio

Theodore PINKSTON v. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 38

City of Cleveland, Ohio, Community Relations Board, June 18, 1956, No. A-123.

SUMMARY: A Negro electrical worker in Cleveland, Ohio, brought a complaint against the IBEW, Local 38, before the Cleveland Community Relations Board. The grounds of the complaint were that the complainant had been refused membership in the union because of his race and was therefore excluded from obtaining employment in his trade where union membership was required. The Board found the complaint to be established and ordered the union to cease from denying the complainant membership because of his race. Following the Findings and Order, below, a "Statement of the Case" by the Board is set out.

SWILER, Vice Chairman.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Upon the pleadings and upon all the evidence .educed on the public hearing of the above cause the Community Relations Board finds the following conclusions of fact:

1. That the complainant served as an Engine

Generator Operator—Maintenance in the United States Army from 1944 until 1947 and since his discharge from the Army in 1947 he has been engaged in the installation of residential and commercial wiring, while employed by three Negro electrical contractors.

2. That the complainant made application to take the Civil Service examination and upon taking such examination he received a passing grade and he was duly certified for employment with the City of Cleveland as an electrician.

3. That the complainant was certified by the Civil Service Commission for three separate jobs with the City of Cleveland and that he was not selected for these jobs because he was not a full-fledged member of the International Brotherhood of Electrical Workers, Local 38.

4. That in 1952, the complainant and other Negro electricians met with Mr. Clayton Lee, the then business agent of the International Brotherhood of Electrical Workers, Local 38, in an effort to work out a method whereby the complainant and other Negroes might be admitted to the Wiring Division of the said Brotherhood.

5. That Mr. Clayton Lee told the complainant and others in 1952, that they could have a temporary working permit on condition that they pay $2.00 per month to the International Brotherhood of Electrical Workers, Local 38, to be applied toward an initiation fee and until such time as the details of admitting Negroes to full membership in the Wiring Division of the Brotherhood were worked out.

6. That the complainant has continued to pay $2.00 per month to the Brotherhood since 1952 and he has been continuously ready, willing, and able to pay any further sums requested by the Brotherhood in order to obtain full membership in the Wiring Division of the International Brotherhood of Electrical Workers, Local 38.

7. That the complainant, in 1952, submitted a completed application card for employment in the said Brotherhood to the International Brotherhood of Electrical Workers, Local 38, through the office of the Cleveland Urban League.

8. That on various occasions subsequent to 1952, the complainant made inquiry of officers and employees of the said brotherhood regarding admission to full membership.

9. That the said officers and employees of the International Brotherhood of Electrical Workers, Local 38, failed to admit the complainant to full membership in the said Brotherhood.

10. That the International Brotherhood of Electrical Workers, Local 38, continues to refuse admission of the complainant to full membership.

11. That there are not nor have there ever been any full members of the Wiring Division of the International Brotherhood of Electrical Workers, Local 38, who are of the Negro race.

And as conclusions of law in this cause based on the foregoing conclusions of fact, the Community Relations Board finds:

1. That the complainant is a qualified electrician capable of performing the work normally done by a journeyman electrician.

2. That the experience and training of the complainant are such that he is properly qualified to be admitted to full membership in the International Brotherhood of Electrical Workers, Local 38.

3. That the International Brotherhood of Electrical Workers, Local 38, discriminated against the complainant by denying him full membership in the said Brotherhood solely because of his race and color.

THEREFORE, in conformity with Section 13.2711 of the Codified Ordinances of the City of Cleveland, and upon all the evidence taken in the complaint in the above cause, the Community Relations Board by unanimous vote finds the Respondent, International Brotherhood of Electrical Workers, Local 38, guilty of committing the discriminatory practice as alleged

and herewith issues the following order to the Respondent:

Upon the application of Theodore Pinkston for admission to membership in the International Brotherhood of Electrical Workers, Local 38, you are hereby ordered to cease and desist from excluding him from full membership rights because of his race.

You are further ordered to cease and desist from failing or refusing to act, both by your membership and your executive board, upon the application of Theodore Pinkston for full membership.

You are further ordered to furnish proof of compliance with the foregoing order to the Executive Director of the Community Relations Board within 60 days hereof.

Tuesday, June 18, 1956

Statement in case of Pinkston vs. Local 38, I. B. E. W.

The unanimous decision of guilty by the Community Relations Board in the complaint of racial discrimination against Local 38, Wiring Section International Brotherhood of Electrical Workers comes only after every other means of settlement has been explored.

At its March 1955 meeting, the Board began its consideration of the complaint, appointing a sub-committee which then held several meetings with the local union's officers and executive committee.

The Board's sub-committee examined thoroughly the membership practices and policies of Local 38 Wiring Section, both as to the admittance of Negro journeymen and acceptance of Negro apprentices. The local union's officials could offer no knowledge or recollection of any Negro ever having been admitted or approved for either membership or apprentice training in the entire history of Local 38.

When the Board's sub-committee could find no means of settling the complaint, it recommended that the issue be referred to Mayor Celebrezze, as provided for by ordinance.

Several months later, the mayor certified the case back to the Board, reporting that all efforts to obtain an adjustment, after four conferences, were without success. In Mayor Celebrezze's role as mediator, he advised the Board that the local union insisted that membership could only be secured by indentured apprenticeship. The mayor asked the local union, as evidence of non-discrimination, to agree to enroll two Negro apprentices. This suggestion was flatly rejected.

The city's anti-discrimination ordinance then left no other alternative but a public hearing. The hearing made it obvious to the Board, through the witnesses testifying, that Local 38's policy and practices apply to all Negroes who attempt to follow the electrician's trade. Theodore Pinkston, the complainant, as an individual applicant was the victim of this action of the union.

In short, Local 38 has made it clear that a Negro cannot and shall not aspire to the occupation of electrician in Cleveland. If he does, he must work outside of regular and accepted union —contractor relationships, entitled only to a precarious "temporary" permit wholly at the mercy of union officials.

In the public hearing, Mr. Vincent Skodis, seeking to explain the "permit," admitted that only a slight effort was made to determine whether any applicant knew enough to be a journeyman.

Mr. Robert Morgan, the complainant's employer stated that his employees, all Negroes as is he, had no freedom to seek another employer, because of an "understanding" in the trade that a white electrician could not work for a colored contractor or a Negro electrician for a white contractor.

This restriction of the limits in which a man can choose his employer violates a basic right which few trade unionists should care to defend.

A trade or labor union which exercises rights which are protected by law, such as the National Labor Relations Act and others, should not claim the privileges and immunities extended to private clubs and fraternal orders to select their members. Labor unions are a basic part of the economic structure of our country and should offer a democratic acceptance of responsibilities in return for privileges or rights of benefit to them.

Fortunately, the vast majority of American trade and labor unions do recognize their obligations.

Those were adequately stated in Article II paragraph 4 of the Constitution of the American Federation of Labor and Congress of Industrial Organizations adopted December 5, 1955 under "Objects and Principle" which read:

"To encourage all workers without regard to race, creed, color, national origin or ancestry to

share equally in the full benefits of organization."

In the building trades, of which Local 38 is an essential part, Cleveland is regarded as "tightly" organized. If racial exclusion exists in these trades, as it still does in some, it is ridiculous to pretend that Negro tradesman can "work" without union affiliation.

Except for a small number of unions, labor organizations have offered a better answer more in keeping with the best democratic traditions of American life.

In conclusion, the Board believes that two public agencies, the Cleveland Board of Education and the City of Cleveland need to examine their relationship to Local 38, I. B. E. W.

Apprentice training for the electricians trade is possible through the facilities of the Cleveland Trade School, soon to move to a new locality and expanded building. The instruction, equipment, and other facilities are maintained at public expense, from local taxes, and some from Federal-State sources.

The United States Supreme Court has held that separate education of the races is *not* equal. What shall Cleveland do where training for a trade is non-existent due to race? Local 38 suggests a separate training program which would accommodate the Negro electrical apprentices. While this would improve skills, it would continue Negro exclusion from the union.

The City of Cleveland, in various departments employs electricians selected by civil service examination. The complainant's testimony indicates that the only question asked of him when certified to various openings was in connection with his status and standing in Local 38, I. B. E. W. If the City of Cleveland follows a "closed shop" arrangement in the skilled trades employed on public work, the unions benefiting from this should abide by law and declared public policy pertaining to membership.

The City of Cleveland, the State of Ohio, and the Federal Government by ordinance, statute and executive order have declared that contracts entered into by them shall not permit discrimination. Unions have no exemption, nor should they conduct their affairs to suggest they expect any.

ATTORNEYS GENERAL

EDUCATION

Public Schools—Kentucky

The Superintendent of Schools of Webster County, Kentucky, requested an opinion of the state Attorney General whether certain Negro children who had presented themselves for enrollment at the Clay, Kentucky, school, previously attended only by white children, might be enrolled at that school without prior action by the county Board of Education. The Attorney General expressed the view that the right of enrollment in a particular school was dependent upon school board action, either voluntary or pursuant to court order. The opinion states further that compliance with the "implementation" decision in the *School Segregation Cases* could be best effected probably by a definite, even though gradual, plan, and that in Kentucky "a rather speedy compliance" is likely to be required by the courts.

September 13, 1956

Mr. Wilbur Collins
Superintendent, Webster County Schools,
Dixon, Kentucky.
Dear Mr. Collins:

In our telephone conversations of yesterday and today, and in your telegram of this date, you have described the official actions taken by the Board of Education of Webster County to implement the decisions of the Supreme Court of the United States in Brown vs. Board of Education of Topeka, 347 U. S. 483, 98 L. Ed. 873, 38 A.L.R. (2d) 1180, and 349 U. S. 294, 99 L. Ed. 1083. The action of your Board has been limited to the appointment of a committee of colored and white citizens to study the proper procedure for desegregation in your county. This committee was appointed last year but has not yet made its report.

You now ask whether two Negro pupils who have presented themselves for enrollment at the school at Clay (heretofore attended solely by white children) are entitled to enrollment without action by your Board of Education. They have previously attended an independent district school under a contract with the County Board.

The first opinion handed down on May 17, 1954, in the case of Brown vs. Board of Education of Topeka, supra, reversed the previous line of opinions establishing the "separate but equal" doctrine, and declared that the segregation of pupils in public schools on the sole basis of racial origins was unconstitutional. That opinion, however, reserved the matter of procedure in desegregation for further argument. The Supreme Court, among other questions, specifically asked for argument on the following matters:

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinction?

"5. On the assumption on which questions 4 (a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4 (b).

"(a) should this Court formulate detailed decrees in these cases;

"(b) if so, what specific issues should the decrees reach;

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

"(d) should this Court remand to the courts

of first instance with directions to frame decrees in these cases, and if so what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

The arguments were made, and the questions were finally determined by the Supreme Court, in the second or "procedural" opinion handed down in May of 1955. Mr. Chief Justice Warren, speaking for the Court, chose to answer questions 4 (b) and 5 (d) in the affirmative, thereby permitting "an effective gradual adjustment to be brought about from existing segregated systems" and returning all of the five cases to the courts of origin. It is to be noted in particular that, of the five cases, the one involving the State of Delaware, came from the Supreme Court of Delaware, which had held segregation unconstitutional in that state. Despite the fact that the Delaware case was not reversed, it was returned to the court of origin for further procedure in line with the "gradualist" concept.

The Supreme Court made it plain that the defendant school boards were required to make a prompt and reasonable start towards good faith compliance with its ruling at the earliest practicable date. However, the Court said: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."

The Board of Education of Webster County therefore has the primary responsibility for proceeding with integration at "deliberate speed." It must assume this responsibility, for if it does not take action, or if it has not taken action with proper speed, any court having jurisdiction, state or federal, may require it to act upon proper application being made to such court.

It is apparent that the Supreme Court desired to establish an orderly process for accomplishing its purposes. It logically places this responsibility upon the local agency in charge of the schools. The corollary of this principle is that an individual parent has no right to enroll his child in a school without some sort of action having been taken by the school board. If he had such right, the orderly process would be completely destroyed.

If the school board has failed in its responsibility under the Supreme Court decision, a parent or group of parents may make application to a court having jurisdiction to compel action by the school board. It is plain, however, as we say again, that action towards integration must be taken by the board itself, either voluntarily or upon orders of a court, before integration begins.

The only case which has arisen in Kentucky since the Supreme Court decision is Willis vs. Walker, 136 F. Supp. 177. In that case the United States District Court for the Western District of Kentucky recognizes the principles which we have just set out. Upon application of a group of Negro parents, and upon the basis of facts set out concerning the school system in the particular county involved, the Court ordered the integration of the high schools of Adair County in Februray, 1956, and the integration of the grade schools of that county in August or September, 1956. This case, and the cases in other states which we have examined, indicate very strongly that the courts will require a rather speedy compliance in most areas of Kentucky. It may be that when this matter is taken to court, if it is, the court will find that Webster County has not acted with the "deliberate speed" required by the Supreme Court. It seems to us that good faith compliance is more likely to be attributed to a school system which has come up with a definite plan, though gradual in its nature, than to a school system which has not adopted any plan at all.

This opinion has been written by the undersigned in collaboration with Assistant Attorneys General M. B. Holifield, Robert L. Matthews, Jr., and David Sebree.

Yours truly,
Jo M. Ferguson
Attorney General

EDUCATION

Public Schools—Ohio

The Attorney General of Ohio was requested by the state Board of Education to furnish an opinion with reference to the construction of the term "the law" in determining whether state funds might be distributed to local school boards which had not "conformed with the law". In Opinion No. 6810, July 9, 1956, the Attorney General stated that that term included interpretations by the courts as well as statutory and constitutional provisions. That opinion follows:

[SYLLABUS BY THE ATTORNEY GENERAL]

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119., Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district nothwithstanding such lack of conformity with the law.

July 9, 1956

OPINION NO. 6810

Mr. R. M. Eyman
Executive Secretary
State Board of Education
State Office Building
Columbus, Ohio

Dear Sir:

I have for consideration your request for my opinion in which the following questions are presented:

> "1) Does the term 'the law and the rules and regulations pursuant thereto' in said Section of the Revised Code (Section 3317.14) refer to all the statutes, decisions and constitutional provisions relating to schools, or to the Foundation Law only, or otherwise?
>
> "2) By what procedure may the state board of education and the state controlling board determine whether a local board of education 'has not conformed with the law'?
>
> "3) In determining whether good and sufficient reason for non-conformance has been established, do the state board of education and the state controlling board act separately or as a unit?
>
> "4) In making such determination, what, if any, investigative and hearing powers does the state board of education have; what rules of evidence must be followed; and what degree of proof is required?"

As to your first question, a provision is found in existing Section 3317.14, Revised Code, for the withholding of state funds in the case of certain school districts as follows:

> "A school district, the board of education of *which has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distri-

bution of funds authorized by sections 3317.02, 3317.04, and 3317.12 of the Revised Code, except for good and sufficient reason established to the satisfaction of the superintendent of public instruction and the state controlling board. * * *" (Emphasis added)

Effective October 1, 1956, an amended provision, analogous to that above, will become effective as follows:

"A school district, the board of education of which *has not conformed with the law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by section 3317.02 of the Revised Code, except for good and sufficient reason established to the satisfaction of the state board of education and the state controlling board. * * *" (Emphasis added)

The use of the article "the" in this statute is suggestive, but only faintly so, of the idea that reference is made to a particular legislative enactment. However, it will be seen that there is not the slightest suggestion in the context of this provision which would aid in identifying any such particular enactment.

Moreover, it is to be observed that the article "the" was inserted in the statute in the course of the 1953 codification, the prior analogous provision in Section 4848-6, General Code, reading as follows:

"A school district, the board of education of which has not conformed with *all the requirements of law* and the rules and regulations pursuant thereto, shall not participate in the distribution of funds authorized by the provisions of sections 4848-1, 4848-3 and 4848-9 of the General Code, except for good and sufficient reason established to the satisfaction of the superintendent of public instruction and the state controlling board: * * *" (Emphasis added)

It thus becomes clear, because of the legislative purpose, clearly expressed in Section 1.24, Revised Code, not to effect substantive changes in the recodification process, that the provision here in question, to the extent that the point is pertinent, must be read as though the article "the" had not been inserted as an incident of such recodification.

In Cyclopedic Law Dictionary, Third Edition, on the definition of the term "law" it is said:

"A distinction is to be observed in the outset between the abstract and the concrete meaning of the word. In the broadest sense which it bears when used in the abstract law, it is the science which treats of the theory of government.

"In a stricter sense, but still in the abstract, it is the aggregate of those rules and principles enforced and sanctioned by the governing power in a community, and according to which it regulates, limits, and protects the conduct of members of the community. In the abstract sense, it includes the decisions of the courts."

In the same work the use of a prefixed article is mentioned as follows:

"Used without an article prefixed, the abstract sense is generally intended; with an article, the sense is usually concrete."

Applying this rule to the case at hand, and giving consideration to the circumstance that the context in which the term is used in Section 3317.14, Revised Code, gives no hint as to the indentity of a particular statute to which reference might be intended, it becomes necessary to conclude that the term "law" as used in that section is used in the abstract meaning of the word.

Because the provision in question relates to the "requirements of law," or conformity therewith, it is clear the term is not here used in such a broad abstract sense as to include the "science which treats of the theory of government," but rather that it is used in the somewhat stricter sense which embraces "the aggregate of those rules and principles enforced and sanctioned by the governing power in a community" and that it "includes the decisions of courts."

Although not set out in your inquiry in express terms, there is latent therein the question of whether the conformity with law provision in Section 3317.14, Revised Code, is sufficient in scope to include instances of segregation of pupils in schools according to race.

In the 14th Amendment of the Constitution of the United States there is this provision:

" * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In Article VI of the Constitution of the United States there is this provision:

" • • • • • • • • •

"This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

" • • • • • • • • •"

It is quite clear that these provisions are such as to be comprehended in the term "law" in the sense in which I have indicated such term is used in Section 3317.14, supra, and where there is a denial of "equal protection of the laws" there is an instance of not having "conformed with the requirements of law" or of not having "conformed with the law" as provided in that section.

The equal protection clause above quoted was the subject of consideration in Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, the headnotes in the latter report of the decision being in part as follows:

"5. The equal protection clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools, even though the physical facilities and other tangible factors, such as curricula and qualifications and salaries of teachers, may be equal."

In the opinion of the court, delivered by Mr. Chief Justice Warren, there is the following statement:

"We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

This decision is the unanimous pronouncement of the highest court in the land and must be regarded as dispositive of the question of the illegality of racial segregation in the public schools of this state.

It follows, therefore, that in those cases in which your board finds as a matter of fact that racial segregation exists in a particular school district the restrictive provisions of Section 3317.14, Revised Code, must be deemed to apply.

As to the question of your board and the controlling board acting jointly or separately, it is first to be observed that the action of the two boards, in approving distribution of funds notwithstanding a failure to conform with the law, is called for only *after* it is determined that a particular district or board "has not conformed with the law."

Because the state board of education is given the authority and responsibility in Section 3301.07, Revised Code, to "administer and supervise the allocation and distribution of all state and federal funds," and because, in Section 3317.01, Revised Code, it is provided that "Sections 3317.01 to 3317.15, inclusive, of the Revised Code, *shall be administered by the state board of education*, with the approval of the controlling board," I conclude that the responsibility to ascertain whether in particular cases there is a lack of conformity with law is placed in the first instance with the state board of education.

In this connection, although the controlling board's approval is required in the administration of Sections 3317.01 to 3317.15, Revised Code, it is to be noted that that board's principal function is one in the field of fiscal management and accountability, whereas it is the duty of the state board of education to "administer" the laws relating generally to the operation of the schools, is provided with a departmental staff for the purpose, and is provided with extensive investigative powers as hereinafter pointed out.

Accordingly, until such an initial determination is made, the question of joint or separate action, under Section 3317.14, Revised Code, to distribute funds notwithstanding such failure, is purely academic.

I may observe in passing, however, that I perceive no language in the statute which in any way suggests joint action of such boards, and the fact that each is a separate entity, separate-

ly created by law, would clearly indicate the necessity of separate action.

As to the procedure by which your board may reach a determination as to a failure to conform to the law in particular cases, your attention is invited to the following provision in Section 3301.13, Revised Code:

> " • • • • • • • • • • • •
>
> " • • • In the exercise of any of its functions or powers, including the power to make rules and regulations and to prescribe minimum standards, the department of education and any officer or agency therein, shall be subject to the provisions of chapter 119. of the Revised Code. • • •"

Because one of the functions or powers of the state board of education is to ascertain whether a failure to conform to law has occurred, it is clear that in such a proceeding the provisions of Chapter 119., Revised Code, will apply. Set out in that chapter are detailed procedures for holding hearings, summoning witnesses, receiving evidence, making adjudication orders, and for appeals from such orders by any person "adversely affected."

As to the rules of evidence to be followed and the degree of proof required, your attention is invited to the following provision in Section 119.12, Revised Code:

> "The court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by *reliable, probative, and substantial evidence* and is in accordance with law. In the absence of such a finding, it may reverse, vacate, or modify the order or make such other ruling as is supported by *reliable, probative, and substantial evidence* and is in accordance with law." (Emphasis added)

Accordingly, in specific answer to your inquiry, it is my opinion that:

1. The term "law" as used in Section 3317.14, Revised Code, forbidding the distribution of state funds to school districts which have not "conformed with the law," is used in the abstract sense and embraces the aggregate of all those rules and principles enforced and sanctioned by the governing power in the community. Such term embraces the equal protection provision in the Fourteenth Amendment of the Constitution of the United States under which the segregation of pupils in schools according to race is forbidden.

2. The primary responsibility for administering the laws relating to the distribution of state and federal funds to the several public school districts is placed with the state board of education, subject to the approval of the state controlling board.

3. It is the responsibility of the state board of education in the first instance to determine whether a particular school district, or the board of education of such district, "has not conformed with the law" so as to require the withholding of state funds from such district. In making such determination the state board of education should observe the requirements of the Administrative Procedure Act, Chapter 119, Revised Code, as to notice, hearing, summoning of witnesses, presentation of evidence, degree of proof, and procedural matters generally.

4. Following a determination by the state board of education that a school district "has not conformed with the law" so as to require the withholding of state funds as provided in Section 3317.14, Revised Code, such board and the controlling board, acting separately, may, for "good and sufficient reason" established to the satisfaction of each board, order a distribution of funds to such district notwithstanding such lack of conformity with the law.

Respectfully,
C. WILLIAM O'NEILL,
Attorney General.

PUBLIC ACCOMMODATIONS

Advertising—Michigan

Opinion Number 2524, June 4, 1956, of the Attorney General of Michigan considers the question whether a resort farm which advertised in a calendar that "for 63 years we have served a gentile clientele" was violating the Michigan Civil Rights Law and might be prohibited from

using the facilities of the Michigan Tourist Council. The Attorney General so found and held that the Council might not distribute such advertising or allow the use of its facilities by the offending resort farm.

Opinion No. 2524 June 4, 1956

Mr. Robert J. Furlong
Executive Secretary
Tourist Council
Stevens T. Mason Building
Lansing 4, Michigan

Dear Mr. Furlong:

In a recent letter, you request my opinion as to whether certain language contained in a calendar advertising Tabor Farms is in violation of the Michigan Civil Rights Law.[1] The language in question, found on the pages for September, October and December of such calendar is as follows:

"For 63 years we have served a gentile clientele."

The Civil Rights statute provides in part at section 1, that

> "all persons within the jurisdiction of this state shall be entitled to full and equal accommodations, advantages, facilities and privileges of *inns, hotels,* * * * *restaurants* * * * and all other places of public accommodation, amusement and recreation * * * *"

Section 2 makes it a misdemeanor for any owner or agent of such place to

> "directly or indirectly refuse, withhold from or deny to any person any of the accommodations, advantages, facilities and privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any * * * communication * * * to the effect that any of the accommodations * * * shall be refused, withheld from or denied to any person on account of race, creed or color *or that any particular race, creed or color is not welcome* * * * *not desired or solicited* * * * *"*[2]

The statute has been upheld, as a valid exercise of the police power of the state, and has been liberally construed.[3] Under it, refusing accommodation to a high school girl by resort operator has been held to violate the statute.[4]

Under the Bob-lo case we think there can be no doubt that the Tabor Farm operation, as described in the calendar, photographic copy of which is attached to your letter, is not a "private pleasure ground" but is a place of public accommodation within the terms of the statute.

The question remains whether the quoted language is violative of the statute.

On May 21, 1947, by Opinion No. 377,[5] this office ruled that the Michigan Tourist Council should deny its facilities to advertisers using such phraseology as "restricted," "restricted clientele," "selected clientele" or "clientele selected," or similar terms, in their literature.

In that opinion, it was stated that,

> " * * * we think it a matter of general understanding and capable of proof that the terms 'restricted', 'restricted clientele,' etc. * * * are generally understood by the public to mean that the restrictions included under that general term are invoked against persons of certain color, race and creed. Advertising which is so understood by the public would appear to be within the prohibition of the statute. We accordingly advise that the Tourist Council should deny the distribution of its facilities to advertisers utilizing such phraseology * * *."

Previously, on July 6, 1945, the Attorney General by letter had written the Michigan Tourist Council as follows:

> "In general this act prohibits any discrimination in accommodations or facilities

1. Chapter XXI of the Penal Code, being §750.146-750.148, CL and Mason's 1954 Supp; §28.343-28.345, Stat Ann 1955 Cum Supp, last amended by Act No. 101, PA 1952.

2. Emphasis supplied.

3. Bolden v. Grand Rapids Operating Company, 239 Mich 318 (1927) negro, refused ticket to public theater, *held* to have right in damages under this statute, although the statute did not then in terms confer a civil right of action. See also Ferguson v. Gies, 82 Mich 358 (1890) discrimination by refusing to serve colored persons except in certain part of room—"saloon side"—was violation of common law of Michigan as to which civil rights statute merely declaratory, thus giving rise to civil rights in damages under criminal statute.

4. Bob-lo Excursion Co. v. People of State of Michigan, 333 U.S. 28, 92 L.Ed. 455, 68 S.Ct. 358 aff'g 317 Mich 686; contrast Meisner v. Detroit, Belle Isle and Windsor Ferry Co., 154 Mich 545 (1908).

5. Report of the Attorney General, 1947-1948, p. 319.

predicated upon race, creed or color, and prohibits the advertising or circulation of any such advertising. If this Council was of opinion that any questioned advertisement was so founded, it would be bound to reject that advertisement; otherwise, you would have a State Agency maintained with state funds a medium or instrumentality by which the advertiser can violate this statute * * *."

The words "for 63 years we have served a gentile clientele" can have only one purpose and meaning in the understanding of the general public; namely, to communicate the idea that Jews are not welcome, not desired and not solicited by those responsible for issuing the calendar containing the language under discussion. Thus, the words are restrictive in design and intent, though artfully worded, and constitute a "cloak and disguise and are indirect means to hide discrimination."[6]

Therefore, you are advised that such language is a violation of the Michigan Civil Rights Law. As a state agency, the Michigan Tourist Council expends public funds and represents the people of the state. You are, therefore, advised that the council should not distribute advertising containing the offending language, nor should it extend the facilities of the office to the advertiser.

Very truly yours,
THOMAS M. KAVANAGH
Attorney General

6. Op. No. 377, *cit supra*, quoting Camp of the Pines v. New York Times, Co., 53 NYS2d 475.

CLASS ACTIONS

A Study of Group-Interest Litigation

I. INTRODUCTION

In the mounting litigation involving race relations, the class action is becoming a procedural device of increasing importance. This study will endeavor to outline the procedure and to consider some of the problems that may arise in the use of this device. The class action has been extensively used by plaintiffs who seek judicial relief from racial discrimination. Each of the *School Segregation Cases*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), 1 Race Rel. L. Rep. 5 (1956) was a class action. See 347 U.S. at 495, 74 S.Ct. at 686. While the great majority of class actions involving race relations have been brought by plaintiffs thus seeking judgment as a class against individual defendants, the device also enables a single plaintiff to sue multiple defendants under certain circumstances without requiring all the defendants to be present in court.

Since the majority of race relations cases arise in the federal court system, this study will be primarily concerned with cases brought under the present federal court rule authorizing class actions. The equitable evolvement of the class action device, which is presently sanctioned in some manner by most American jurisdictions, is discussed below.

This discussion of the federal class action rule will be primarily concerned with race relations cases. However, all too frequently the courts have passed over any possible class action issue with cursory treatment, or even without any consideration or discussion of the question. Thus it is often necessary to illustrate the basic points involved in the application of the rule with cases not involving racial problems.

II. THE FEDERAL CLASS ACTION RULE

"Rule 23 [Federal Rules of Civil Procedure]. Class Actions.

(a) **Representation.** If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought."

(b) **Secondary Action by Shareholders.** [omitted].

(c) **Dismissal or Compromise.** A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it." 28 U.S.C.A.

III. HISTORY OF CLASS ACTIONS

The class suit evolved through necessity in the early English equity courts. As early as the year 1734 the English chancery courts had adopted a rule requiring the joinder of all interested parties in cases before those courts. *Knight v. Knight*, 3 P.Wms. 331 (1734). As may readily be seen, a relentless application of this rule would effectively preclude decisions in those

cases in which by reason of numbers or geographical remoteness it was impractical or impossible to get all the interested parties before the court. The class action was both an escape from and an adjustment to the rules of joinder. See 3 Moore, Federal Practice, 3411 (2d Ed. 1948).

The utility of the class action and the impracticability of any other type of procedure led to the widespread use of the device. The leading early English case involving the class action is *Walworth v. Holt*, 4 My. & Cr. 619, 41 Eng. Rep. 238 (1841). Two participants in an English banking institution, which had become insolvent, there brought a chancery action against the managers of the bank who were in possession of the assets of the business. The plaintiffs asked that all the assets be sold and that the proceeds be applied to the debts of the business. The plaintiff's prayer alleged, inter alia,

> ". . . that the number of the shareholders of the company was so great, and the rights and liabilities of such shareholders were so subject to change and fluctuation, by death or otherwise, that it was not possible, without the greatest inconvenience, to make them parties to the suit; and that so to do would render it impossible, in fact, to prosecute the suit to a hearing, and that all stockholders had a common interest in having the partnership property duly got in and applied, under the direction of the Court, in satisfaction of the partnership debts; . . ." 41 Eng. Rep. at 241.

In granting the desired relief the court allowed the two shareholder-plaintiffs to bring the action on behalf of themselves and all other shareholders, except those shareholders named as defendants. The court pointed out that, should it refuse the relief prayed for by the plaintiffs,

> ". . . . the door of the Court would be shut in all cases in which the partners or shareholders are too numerous to be made parties, which in the present state of the transactions of mankind would be an absolute denial of justice to a large portion of the subjects of the realm in some of the most important of their affairs." 41 Eng. Rep. at 244.

The rule announced in the *Walworth* case became the basis of the English class action, and under the sponsorship of Lord Eldon, class actions became a firmly established and popular form of procedure in the English chancery courts. For a complete listing of the early English cases, see 1 Montagu, Digest of Pleading in Equity 57 (1824).

U.S. Doctrine Develops

During this same period Justice Story formulated a corresponding doctrine in the United States. Directly adopting the English basis for the device, he carefully outlined and classified the various types of class actions in his treatise on Equity Pleading. Because these groupings were subsequently adopted by the Federal court system, first in Equity Rule 38, later in the present Rule 23 of the Federal Rules of Civil Procedure, both of which authorized class actions in the Federal courts, it is useful to examine the classifications. The most common types of class actions, according to Story, are: "(1) where the question is one of common or general interest, and one or more sue, or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue, or defend, may fairly be presumed to represent the rights and interests of the whole; and (3) where the parties are very numerous and though they have, or may have, separate and distinct interests, yet it is impracticable to bring them all before the court." Story, Equity Pleading 98 (2d ed. 1840).

However, even prior to the publication of Story's treatise, the American courts had considered a few cases involving class actions. In *West v. Randall*, 29 Fed. Cas. 718, No. 17,424 (C.C.R.I., 1820), one of the heirs at law of an intestate brought a bill in equity for an accounting of the decendent's estate and for distribution to the heirs of their respective shares. The plaintiff sought to bring his bill without joining the other heirs or in any manner making them parties to the action. The court pointed out that, normally, in order to prevent subsequent litigation over the same issues and to insure justice to all the parties concerned, all interested parties must be before the court.

> "The reason is that the court may be enabled to make a complete decree between the parties, may prevent future litigation by taking away the necessity for a multi-

> plicity of suits, and may make it perfectly certain, that no injustice shall be done, either to the parties before the court, or to others, who are interested by a decree, that may be grounded upon a partial view only of the real merits." 29 Fed. Cas. at 721.

While the court dismissed the action, enumerating errors in pleading as well as defects going to the merits of the bill, it overruled the defendant's contention that the court had no jurisdiction because proper parties were not present.

> "The rule . . . that all persons, materially interested in the subject of the suit, however numerous, ought to be parties . . . must not be adhered to in cases, to which consistently with practical convenience it is incapable of application. . . ." 29 Fed. Cas. at 722.

The court held that a class action in which the proper criteria were present in no way would violate this rule.

Impracticability Important

While the class action originated as a means to circumvent the rigid rules requiring joinder of parties in chancery, the modern cases apparently consider the "avoidance of multiplicity of suits" and the "impracticability of requiring the appearance of numerous parties plaintiff or defendant before the court" to be the reasons for the rule. Perhaps the leading American case recognizing this view is *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 14 L.Ed. 942 (1853). In that case five ministers of the Methodist Episcopal Church, South, representing approximately fifteen hundred other ministers of that Church, sought a determination of their rights concerning a printing establishment against approximately thirty-eight hundred defendant ministers of the northern branch of the same church. The incorporated Methodist book concern and three of the northern ministers were brought into court as the actual defendants. Relying heavily on the class action rules formulated by Justice Story in his treatise, the Supreme Court ordered the fund in question to be divided into two parts, according to the proportion of northern ministers to southern ministers. The court stated:

> "Where the parties interested in the suit are numerous, their rights and liabilities are so subject to change and fluctuation by death or otherwise, that it would not be possible, without very great inconvenience, to make all of them parties, and would oftentimes prevent the prosecution of the suit to a hearing. For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court. The legal and equitable rights and liabilities of all being before the court by representation, and especially where the subject-matter of the suit is common to all, there can be very little danger but that the interest of all will be properly protected and maintained." 57 U.S. at 303.

The language of the *Swormstedt* case, coupled with the analysis made by Justice Story, formed the basis of Equity Rule 38, the predecessor of the present Rule 23. Although the equity rule allowing class suits used in the federal courts during the latter part of the nineteenth century contained the provision that "in such cases the decree shall be without prejudice to the rights and claims of absent parties." Equity Rule 38 formulated in 1912 by the Supreme Court lacked this language. It read as follows:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole." 226 U.S. 659 (1912).

Ben Hur Case

The leading case involving the construction of Equity Rule 38 by the United States Supreme Court was *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921), which was several times before the courts. In the first action, residents of states other than Indiana brought suit in a federal court in Indiana against the Supreme Tribe of Ben Hur, a fraternal benefit association organized under the laws of Indiana, and the officers of the association, all of whom were residents of Indiana, to enjoin the proposed reorganization of the Tribe. The prospective reorganization included an alteration of the method of insurance premium payments and the authorization of a new class of membership in the association. The

plaintiffs sued as a class, representing all of the 70,000 members of the Class A of the Tribe, some of whom lived in Indiana with the rest scattered throughout fifteen other states. The federal court heard the suit and dismissed it on the merits.

After this decision residents of Indiana brought a similar suit in an Indiana state court to enjoin the same reorganization. In its turn the Tribe, in yet a third suit, sought in a federal court in Indiana to enjoin the suit in the state court. The Tribe alleged that the former decree in the federal court bound the Indiana residents in Class A of the association as well as those members of Class A who were residents of other states. The district court dismissed the suit for want of jurisdiction, holding that since the prior suit in the federal court was based solely on diversity of citizenship, no federal question being present, those members of the plaintiff class who were residents of Indiana were not bound by the prior decree. The court said in its certificate of appeal:

> ". . . [T]he presence of such Indiana members of Class A as plaintiffs would have ousted the jurisdiction of the court in the main suit, such jurisdiction being based only on diversity of citizenship and not on any federal question, and that therefore the decree in the main case was and is not *res adjudicata* as to Indiana members of . . . The Supreme Tribe of Ben Hur." As quoted by the United States Supreme Court, 255 U.S. at 362.

For the lower court's opinion, see 264 Fed. 247 (D.Ind. 1920).

The Supreme Court reversed the district court on appeal, holding that in class action situations the fact that some of the members of the plaintiff class were citizens of the same state as the defendants would not effect an ouster of federal jurisdiction because of lack of diversity of citizenship. Mr. Justice Day stated for the Court:

> "That the persons in Class A of the society were so numerous that it would have been impossible to bring them all before the court, is apparent from a statement of the case. They numbered many thousands of persons, and resided in many different States of the Union. There was the requisite diversity of citizenship to justify the bringing of a class suit in the United States District Court for the District of Indiana. The court, therefore, properly acquired jurisdiction of the suit, and was authorized to proceed to a final decree." 255 U.S. at 364.

The court then stated further:

> "Owing to the number of interested parties and the impossibility of bringing them all before the court, the original suit was peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; their rights were duly represented by those before the court. The intervention of the Indiana citizens in the suit would not have defeated jurisdiction already acquired. . . . Being thus represented, we think it must necessarily follow that their rights were concluded by the original decree." 255 U.S. at 366.

The present Rule 23 was one of the Federal Rules of Civil Procedure adopted in 1937 by the Supreme Court of the United States. While Rule 23 was, in effect, no more than a substantial restatement of Equity Rule 38 as it had been applied previously by the federal courts in equity cases, the Committee Report by the drafters of the Federal Rules emphasized that Rule 23 was to be of broader application. The Committee stated that Rule 23 should apply to all actions, whether formerly labeled as "legal" or "equitable" in nature. [The full text of the Committee Report is set out in 28 U.S.C.A., Rule 23 at p. 83.] This extension of the rule has met with general acceptance by the federal courts, many of which had formerly held that there could be no "law" action under Equity Rule 38. [See e.g., *McNary v. Guaranty Trust Co.*, 6. F.Supp. 616 (N. D. Ohio 1934).]

The language of Judge Sanborn in *Montgomery Ward, Inc. v. Langer*, 168 F.2d 182 (8th Cir. 1948) serves as a ready example of the favor that Rule 23 found in the courts:

> ". . . Rule 23 (a) (1) is, by the express terms of Rule 1, applicable to all civil actions, whether legal or equitable." 168 F.2d at 186.

After a discussion of the application of Rule

23 to the case under consideration, the court continued:

> "By Rule 23 the Supreme Court has extended the use of the class action device to the entire field of federal civil litigation by making it applicable to all civil actions. The usefulness of the device in its new environment will depend largely upon the attitude of the courts. If the device is to be loaded down with arbitrary and technical restrictions, it will serve no very useful purpose in the enlarged field. If, on the other hand, the courts will disregard the ancient and often arbitrary distinctions between actions at law and suits in equity and permit the Rule to operate in all cases to which it justly and soundly may be applied, it will serve its intended purpose." 168 F.2d at 18.

The *Montgomery Ward* case held that a plaintiff could maintain a class action for libel against an unincorporated labor union by suing only certain officers of the union as representatives of the union as a class.

The rapid growth and popularity of the class action in present day litigation indicates that the federal courts have indeed allowed the class action to grow, unhampered by ancient and arbitrary restrictions.

IV. PREREQUISITES OF MAINTAINING A CLASS ACTION UNDER RULE 23 (a)

(1) Size of Class—Impracticability of Joinder

At the outset Rule 23 states that the persons constituting the class must be "so numerous as to make it impracticable to bring them all before the court." The question of how many persons must be members of the class in order that this prerequisite may be satisfied has been subject to varying opinions by the courts. It may safely be said that there is no set number that is too small and conversely no number that is in and of itself automatically great enough. In passing it is interesting to note that at least one state court decision construing a statute similar to Rule 23 held that as few as four persons satisfied this type of requirement, *Perkins & Co. v. Diking Dist. No. 3*, 162 Wash. 227, 298 Pac. 462 (1931), while another state court held that 101 persons were insufficiently numerous. The court believed that impracticability of joinder had not been shown since affidavits had been obtained from each member of the class. *Tobin v. Portland Mills Co.*, 41 Ore. 269, 68 Pac. 743 (1902). For additional state cases, see 3 Moore, Federal Practice 3421 (2d ed. 1948).

The federal decisions under Rule 23 reflect a pragmatic judgment by each court on the meaning of "numerous" and "impracticable" based on the particular facts of the individual case. In cases outside the field of race relations, one lower federal court has held that nine persons did not compose a class under Rule 23 without some explanation as to why other members of the class could not be joined. *Coxhead v. Winstead Hardware Mfg. Co.*, 4 F.R.D. 448 (D. Conn. 1945). Still other federal cases have held 39 persons not sufficient, *Atwood v. National Bank of Lima*, 115 F.2d 861 (6th Cir. 1940) and 40 persons were sufficient, *Citizens Banking Corp. v. Monticello State Bank*, 143 F.2d 261 (8th Cir. 1944); but where the class exceeded 1,000 persons, the court held that the number alone obviously justified a class action. *Moline v. Sovereign Camp of the Woodmen of the World*, 6 F.R.D. 403 (D. Neb. 1947).

The requirement that, in order for a class action to be maintained, the parties be so numerous as to make joinder impracticable, in essence constitutes two different, complementary tests and both must be satisfied before a successful class action can be maintained under Rule 23 (a). Mere numerical greatness is not in and of itself controlling; impracticability must be shown as well. As indicated in the *Swormstedt* case, *supra*, another important test is whether the individuals sought to be designated a class possess "rights subject to change and fluctuation by death or otherwise, so that it would not be possible without great inconvenience, to make all of them parties." However, no single factor is controlling. All the circumstances present in the individual case are important. The following language of the court in *Pacific Fire Ins. Co. v. Reiner*, 45 F.Supp. 703 (E.D. La. 1942), a non-race relation case in which class relief was denied serves to illustrate these points. There the court stated:

> "A suit is not truly a 'representative suit' merely because the plaintiff, *as here*, so designates it; whether it is depends upon the attending facts.

"There must be a positive showing made that, because of the great number of persons similarly to be affected by the sought-for judgment, it is impracticable to bring all of them 'personally' into the suit. This does not mean that the *impossibility* of so making them parties must be established; it is sufficient that it be shown that it is extremely difficult or inconvenient to join them and the determination of that fact is within the sound discretion of the Court, which is charged with the responsibility of deciding (as condition precedent to the existence of the claimed right to maintain a class action) whether adequate representation will actually be afforded to the otherwise unrepresented interests, by the one or more plaintiff or defendant electing or made to appear as representative of the class.

"The great disparity in numbers between the [actual defendant appearing in the suit] and the remainder of the class of 5,000 and more, whom plaintiff seeks to have represented by the one, is an important fact to be considered in determining the question whether defendant . . . is fairly representative of the class of 5,000. . . ." 45 F.Supp. at 708.

Effect of Few Plaintiffs

Turning now to cases in the field of race relations litigation, it may be seen that frequently a court presented with an alleged class consisting of a small number of persons may be influenced by that fact alone to refuse to entertain the suit as a class action. In *Jackson v. Rawdon*, 135 F.Supp. 936, 1 Race Rel. L.Rep. 75 (N.D. Texas, 1955), for example, the lower federal court was confronted with the following situation. A class action was brought against the superintendent and the board of trustees of the Mansfield Independent School District to secure the admission of Negro students to the public high school. Only twelve Negroes of high school age resided in the district. Three of these brought the action on behalf of themselves and the others whom the actual plaintiffs described as "so numerous as to make it impracticable to bring all of them" into court. While the court dismissed the action on other independent grounds, the district judge observed that,

"The employment of the device of a class suit here is indiscriminate if not improper where only 12 colored high school students are involved, which indicates that the other nine Negro students did not wish this action at this time. Likewise the failure of one of the three plaintiffs to appear in Court and testify raises a question as to whether he wanted to change schools now." 135 F.Supp. at 937.

There was no discussion of the propriety of the class action in the opinion by the Court of Appeals reversing the District Court, ____F.2d ____, 1 Race Rel. L.Rep. 655 (5th Cir. 1956).

Size Sometimes Unspecified

Many courts have allowed class actions without specifying the exact numerical size of the class. [See e.g., *Templeton v. Atchison, Topeka, & Santa Fe R.R.*, 9 F. R. Serv. 23(a)14 Case 1 (W.D. Mo. 1946).] However, other courts have granted relief only after conscientiously noting the alleged class as set out in the petition and considering the applicability of Rule 23. For example, in *Gonzales v. Sheely*, 96 F.Supp. 1004 (D. Ariz. 1951), two fathers of children of Mexican or Latin-American descent brought an action against the trustees of the Tolleson Elementary School District to gain admission for their children to the local elementary school. The action was brought on behalf of some 300 other children of similar ancestry residing in the district. The court granted a preliminary injunction *pendente lite* enjoining the board from denying admission to the children. The court stated that the parties were so numerous that it was impracticable to bring them all before the court and added that as the questions presented in the suit were of common or general interest, a proper class suit situation was present under Rule 23. In *Carter v. School Board of Arlington County, Va.*, 182 F.2d 531 (4th Cir. 1950), a Negro high school student brought an action "on her own behalf and on behalf of 300 colored students in Arlington County similarly situated" seeking to compel the local school board to provide Negro school facilities "substantially equal" to those provided for the white children in the county. The Court of Appeals reversed the district court, which had denied relief. The appellate court pointed out that the plaintiff's evidence did show inequality of school facilities and that the other students on whose behalf she sued were similarly situated and were too numerous to be brought into court.

In *Lopez v. Seccombe*, 71 F.Supp. 769 (S.D. Calif. 1944), five persons of Mexican or Latin-American descent brought an action against the mayor and members of the city council as well as other lesser city officials of the city of San Bernardino seeking to restrain the officials from further exclusion of the plaintiffs and 8,000 other persons of similar ancestry from the public swimming pool, bath houses, and related facilities. The court granted the permanent injunction sought by the plaintiffs stating that some 8,000 persons were involved and concluding:

> "That the questions involved by these proceedings are one of common and general interest and the parties are numerous and it is impracticable to bring all of them before the Court. Therefore, these petitioners sue for the benefit of all." 71 F.Supp. 772.

Other Factors

Still other factors may have a bearing on the number of people required for the class action to be suitable. While the geographical distances between members of the class raises no obstacle per se to the ordinary class action, as was illustrated in the *Ben Hur* case, *supra*, where members of the plaintiff class lived in some sixteen states, certain political boundaries may limit classes in certain situations. Ready example of such instance is to be found in the typical case wherein the plaintiffs, numerous Negro citizens seeking admission to a segregated public school, seek to enjoin the local school board from alleged racial discrimination in the administration of the school system. In such a case apparently the geographical area which the defendant board is officially constituted to serve defines the territory within which a citizen must reside in order to be counted as a member of the plaintiff class. Doubtless in the case of a state university, the state borders define the class affected by a decree in a class action opening the doors of a state university to Negroes, as was indicated in *Johnson v. Board of Trustees of University of Kentucky*, 83 F.Supp. 707 (E.D. Ky. 1949). The plaintiff, a Negro citizen and resident of Kentucky, sought admission to the University, both for himself and others similarly situated. The court stated,

> "The rights involved in this action are of common and general interest to all Negro citizens of the Commonwealth of Kentucky who possess the qualifications requisite for admission to the Graduate School of the University of Kentucky. This action is properly brought as a class action under Rule 23 (a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. . . . The class which plaintiff represents is composed of the Negro citizens of the State who possess the requisite qualifications for admission to the graduate and professional schools of The University of Kentucky." 83 F.Supp. at 709, 710.

However, the problem has never been considered as to whether or not Negro citizens of other states could constitute a class which might seek admission to a state university, since the admission of out-of-state students is usually a discretionary matter with the administration of a state university. Of course, preliminary to this question would be that of whether such a class, if it were legally cognizable, would have a right protected under the Fourteenth Amendment.

Area May Be Limited

That the geographical area from which the class may come may be more limited than "state wide," was indicated in *Jackson v. Rawdon*, *supra*, where the court, in determining the extent of the plaintiff class, considered only those Negroes of high school age (there were twelve) who resided within the Mansfield Independent School District. In comparison with the *Jackson* case the court in *Lopez v. Seccombe*, *supra*, limited the class to "citizens of the United States and residents or taxpayers of said City and County" concluding:

> "That this action is brought on behalf of petitioners and some 8,000 other persons of Mexican and Latin descent and extraction all citizens of the United States of America, residing within said district." 71 F.Supp. at 772.

(2) Proof that the Class Exists.

A mere allegation by the plaintiff that his action is a class suit brought not only for his personal benefit but for the benefit of others similarly situated is not sufficient to enable the court to proceed under Rule 23. For example, the court denied class relief in *Galdi v. Jones*, 141 F.2d 984 (2d Cir. 1944), a non-race relation

case in which the plaintiff sought to invoke Rule 23 by a mere designation in his pleadings that his case was a class action. The court noted, "That plaintiffs themselves called the second 'cause of action' a 'class suit' is unimportant." 141 F.2d at 992, n.4. Whether a class action situation exists, or does not exist, depends upon the surrounding facts and circumstances. The plaintiff seeking to maintain a class action not only must allege the existence of all the necessary facts but must be able to establish them to the satisfaction of the court.

As has already been pointed out, the first prerequisite of a class action is the existence of a "numerous class." While all the members of the class need not be listed when it is impracticable to do so, *Coleman v. Springsely Realty Corp.*, 7 F. R. Serv. 23(a)14 (S.D.N.Y. 1943), there must be an accurate showing that there is a class in existence and that the other members of the class wish to have their rights protected. Lack of proof that there are others in the same situation as the plaintiff has served as an obstacle to successful class actions in several race relations cases.

In *Williams v. Kansas City, Mo.*, 104 F. Supp. 848 (W.D. Mo. 1952) *aff'd.*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826, 74 S.Ct. 45, 98 L. Ed. 351 (1953), the defendant city maintained an 1800 acre public park which included a swimming pool. All the park facilities ". . .when seasonably open, [could] be used and enjoyed by the public generally, regardless of race or color—except the swimming pool located therein." 104 F.Supp. at 851. Negroes who had been denied admission to the pool sued on behalf of themselves and all other Negro citizens similarly situated. The trial court denied relief in class action form, stating,

> "There is no evidence before this court that Negro citizens, other than plaintiffs, have ever . . . been refused admittance solely because of their race or color." 104 F.Supp. at 857.

On appeal, the Court of Appeals *affirmed*, 205 F.2d 47 (8th Cir. 1953), *cert. denied*, 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed. 351 (1953), commenting:

> "While this viewpoint is perhaps a bit technical and unrealistic in view of the Park Board's admitted policy of exclusion, yet a trial court is not without some measure of judgment as to whether a class adjudication can serve any useful purpose in a particular situation. We shall accordingly not undertake to disturb the denial of class relief made by the trial court on this latter basis—and especially so since there seems no reason to believe that the City and Park Board will presume to give the adjudication made a personal operation as to the immediate plaintiffs only, in the situation involved." 205 F.2d at 52.

Class relief was also denied in *Mitchell v. Wright*, 62 F. Supp. 580 (M. D. Ala. 1945), after the plaintiff failed to prove his allegation that there were others similarly situated for whom he had brought the suit. In that case a Negro plaintiff sued the Alabama election registrars for denying him voting privileges by their refusal to register him solely on account of his race. The trial court dismissed the action, stating:

> "For the plaintiff Mitchell to be able to prosecute this action as a class action, it must be brought in behalf of other persons similarly situated. And for these other persons to be similarly situated, it must be more than a likelihood that there are such other persons similarly situated, the situation must actually exist, and the 'Class' must be a reality, not a possibility . . .
>
> "Registration is an individual matter, each case is considered on its own merits and demerits, and whether a person is entitled to be registered or not is determined solely by weighing his qualifications and disqualifications, if any, by the standards outlined in the Constitution and statutes of the State of Alabama, which standards are not questioned by the plaintiff in this action. 62 F. Supp. at 582."

After discussing an earlier case relied on by plaintiff, the opinion continued:

> "The mere allegation that the defendants discriminated against other members of the Negro race in Macon County in refusing registration to them because of their race and color would not suffice to place them in a class with the plaintiff Mitchell, unless it was determined by this court that such person, or persons, possessed all the qualifications required by law and none of the disqualifications, and that refusal to register

said person or persons by the defendants was solely on account of race discrimination, which can only be done by considering all the facts and circumstances of each particular case, and only after such finding, if true, would that person become a member of such class." 62 F.Supp. at 583.

Proof of Class Difficulties

"Lack of proof that the class exists" was an argument strongly urged by the defendants in two race relation cases in which two federal courts, handling the argument in different ways, reached opposite results.

In *Frasier v. Board of Trustees of the University of North Carolina*, 134 F.Supp. 589, 1 Race Rel. L. Rep. 115, (M.D.N.C. 1955), *aff'd per curiam*, ——U.S.——, 76 S.Ct. 467,—— L.Ed.——, 1 Race Rel. L. Rep. 298 (1956) three Negro youths in a class action sought a declaratory judgment that the order of the defendant board denying plaintiffs admission to the University was a violation of their rights under the Fourteenth Amendment. The board defended by stating that such a judgment in a class action would deprive the school of its power to pass upon the qualifications of each individual applicant to the University. The court in refusing to sustain the defendant's contention, stated:

> "Such is not the case. The action in this instance is within the provisions of Rule 23 (a) of the Federal Rules of Civil Procedure because the attitude of the University affects the rights of all Negro citizens of the State who are qualified for admission to the undergraduate schools. But we decide only that the Negroes as a class may not be excluded because of their race or color; and the Board retains the power to decide whether the applicants possess the necessary qualifications. This applies to the plaintiffs in the pending case as well as to all Negroes who subsequently apply for admission." 134 F.Supp. at 593.

In *Tureaud v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 116 F.Supp. 248 (E.D.La. 1953), a lower federal court in Louisiana reached an opposite result when faced with the identical argument as that which was presented by the defendants in the *Frasier* case, *supra*. In the *Tureaud* case, a Negro minor alleged that the action of the defendant administrative officers in denying him admission to the university because of his race was a violation of his rights under the Fourteenth Amendment. In ruling that the case was a matter for a three-judge court, the Court of Appeals made the following statement:

> "Undoubtedly the states still have the authority to prescribe the qualifications for admission to public schools, applicable to all candidates regardless of color. This being true, each applicant must allege and prove that he is qualified. In this situation it is difficult to perceive how a court can deal with a single plaintiff's case on the theory of a class action in such a manner as to subject the Board of Supervisors to contempt citation if they should deny to other applicants, not actual parties to the action, admission solely because they are Negroes. Not only would each applicant have to prove his color, but he would also be bound to prove his individual qualifications and to prove that he has offered to furnish a showing as to such matters to the proper school authorities." 226 F.2d 714 at 719 (5th Cir. 1955).

Quantum of Proof Needed

In the same opinion the appellate court made the following comment as to the quantum of proof necessary to establish that there was in fact a class in existence:

> "In this record, there is no proof to sustain the allegation that there are many others besides complainant, too numerous to make parties, having the identical status and possessing the necessary qualifications for admission to the same college and courses. Certainly there can be no such all-inclusive injunction covering all members of an alleged class without proof that the others desire to be so represented in substantial numbers or have requested plaintiff so to represent them. Such facts cannot be assumed." 226 F.2d at 719.

The later history of the *Tureaud* case, many times before the courts, sheds some light on the class action issue. The Supreme Court reversed the holding of the Court of Appeals for "action in light of the School Segregation Cases" in a

brief *per curiam* opinion, 347 U.S. 971, 98 L.Ed. 1112, 74 S.Ct. 784, 1 Race Rel. L. Rep. 14 (1954). Upon remand to the Court of Appeals the injunctive relief requested by the plaintiff was granted in a *per curiam* opinion by the majority with no discussion of the class action issue. 228 F.2d 895, 1 Race Rel. L. Rep. 110 (5th Cir. 1956). However, Circuit Judge Cameron, in a vigorous dissent, stated:

> "Appellee's right to proceed as representative of others in a class action was challenged by appellant and . . . no evidence was offered to sustain even the inadequate averments of the complaint. Those averments standing alone were insufficient to make out even a prima facie showing of appellee's right to represent the supposed class, and in the absence of evidence there was nothing on which the Court below could base a holding that the class action was proper.
>
> "The wisdom of the rule limiting class actions to those in which the pleadings and the proof point out the members of the class, their location, the character of the common interest between the class and the litigant who essays to speak for it, and similar details, is well illustrated by this case. While no member of the class sought to intervene as a party or to give any testimony, the rights of the supposed class would, if this were a legitimate class action, be entitled to protection by this Court. . . . That protection could be given only if the class is so clearly pointed out in the pleadings and the proof that this Court could, by proper notice, bring in some of its members to carry on the litigation if that course should be found desirable. There is nothing in this entire record which would enable us to proceed effectively or intelligently in vouchsafing that protection.
>
> "The cogent necessity of having the class so well defined that the Court can put its finger upon its members is further manifest when it is considered that an adverse judgment binds the members of a class as well as one which is favorable." 228 F.2d at 898. Footnotes omitted.

(3) The Three Types of Class Actions under Rule 23(a)

Rule 23(a) of the Federal Rules of Civil Procedure divides class actions into three categories, as set out *supra*. This category-classification has provoked much discussion in the courts and by the text writers. Perhaps no other single aspect of class action litigation under Rule 23(a) has been more severely criticized.

The courts apparently have great difficulty in classifying each individual class suit as properly falling into a single category. Many leading authorities contend that the classifications in question are surplusage, that they should be deleted from Rule 23(a), and that classification of a particular class suit into one of the categories creates no practical difference in result.[1] It must be added in support of this view that a great many courts make no classification at all in the class action cases, merely stating that the particular suit arises under Rule 23(a) and ignoring the three categories entirely. Still other courts make use of the categorical divisions but apparently do not permit them to override a result otherwise deemed desirable.

On the other hand, authorities led by Professor J. W. Moore, strongly urge that all class actions must be categorized according to the character of the rights asserted and that entirely different results will flow from the several classifications.[2]

Each of the categories under Rule 23(a) has been given a popular name: Rule 23(a)(1) is termed a "true" class action; Rule 23(a)(2) is termed a "hybrid" class action; and Rule 23(a)(3) is termed a "spurious" class action.

'True' Class Suit Defined

According to the authorities led by Professor Moore, the "true" class suit is "one wherein, but for the class action device, the joinder of all interested persons would be essential. This would be in cases where the right sought to be enforced was joint, common or derivative." 3 Moore, Federal Practice, at 3435 (1948). To illustrate the "joint right" class action situation, a suit by or against representatives of an unincorporated association where relief could not be obtained without joining all the members of

1. See, Chafee, Some Problems of Equity, pp. 243 ff. (1950); Lesar, *Class Suits and the Federal Rules*, 22 Minn. L. Rev. (1937); Keefe, Levy, and Donovan, *Lee Defeats Ben Hur*, 33 Cornell L. Q. 327 (1948); Note, 46 Col. L. R. 818 (1946).
2. See, 3 Moore, Federal Practice 3434 *et seq.* (2d ed. 1948); Moore and Cohn, *Federal Class Actions*, 32 Ill. L. Rev. 307 (1937); Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 Georgetown L. Rev. 551 (1937).

the association to enforce a right due from the organization would be in point. The stockholders' derivative suit against a corporation to enforce a corporate right serves as a ready example of a "derivative" class suit, while "common rights" are illustrated by such a situation as was present in the *Swormstedt* case *supra* where both plaintiff and defendant were classes and the right sought to be enforced was common to both classes.

Of little importance to the race relations litigation field is the "hybrid" class action category which is characterized by "several rights"; those involving a common question of fact, and the presence of property which calls for distribution. An example would be the debtor-creditor situation in which each creditor has his personal right to a stated amount of the debtor's assets, but the creditor's rights are "several" in that no other creditor has interest identical to that of the creditor-plaintiff. The "hybrid" class action suit is now decreasing in importance, but in theory a "hybrid" judgment is conclusive only as to ownership of the property and not as to claims by unnamed creditors against the debtor. 3 Moore, Federal Practice 3425 (2ded. 1948); But see Chafee, Some Problems of Equity 252 ff (1950), criticizing this conclusion.

'Spurious' Class Suit

The "spurious" class suit, according to Professor Moore and his colleagues, is merely a permissive joinder device whereby numerous plaintiffs are interested in a common question of law or fact, and one of their number enters the court to have the "litigious" question settled. The major distinction between the "spurious" situation and the "true" class suit under this theory is that the judgment in the "true" class suit situation is *res judicata* and binding on the absent members who were represented, while in the "spurious" situation only those parties actually present in court are bound by the decree. There is no case authority directly in point that sustains this view. However, it is interesting to note that in the following race relations cases the court did in fact label the action as a "spurious" class action.

In *Johnson v. Crawfis*, 128 F.Supp. 230, 1 Race Rel. L. Rep. 151 (E.D.Ark. 1955) the plaintiff, an eleven year old boy suing by his next friend, had been adjudicated insane by the probate court but had been denied admission to a state hospital, allegedly because of his race. The suit named as defendants the superintendent of the state hospital and five members of the hospital board. The state had only one such hospital, and the plaintiff instigated his suit as a class action. The court stated that the

> ". . . plaintiff is a member of a 'spurious class' who allege that they have been adjudged to be entitled to admission to the State Hospital as persons suffering from a psychosis and have been denied the right of admission." 128 F.Supp. at 237.

The court sustained the defendant's contention that the plaintiff had been denied admission not because of race discrimination, but because there were no beds available at the hospital for the plaintiff. There was also evidence offered by the defendant that both Negroes and Negro children had been admitted to the hospital in the past. The suit was dismissed. However, no language in the court's opinion indicates that any significance was attached to the labeling of the action as "spurious" or would have been attached had the plaintiff been successful.

In *Wilson v. Beebe*, 99 F.Supp. 418 (D.Del. 1951) an unspecified number of plaintiffs sought a declaratory judgment that certain provisions of the Delaware Constitution and other Delaware statutes were unconstitutional. In a footnote the court stated that "The suits are *spurious* class actions brought pursuant to Rule 23(a)(3), F.R.C.P., 28 U.S.C.A." 99 F.Supp. at 419, n. 3. The court stayed the action, pending disposition of a similar proceeding brought in a state court, with no discussion of any difference in result that might flow from the "spurious" label.

In *Fusae Yamamoto v. Dulles*, 16 F.R.D. 195 (D. Hawaii 1954) the plaintiff sought a judgment declaring her to be a United States national. The court handled the case by "assuming but not deciding that this is a class suit, it is a spurious class suit" and held that the plaintiff was not entitled to relief, as such a suit was no longer allowed under the Immigration and Nationality Act of 1952, which had been repealed effective in 1954.

'True'-'Spurious' Division Criticized

Professor Moore's view as to the effect of judgments in "true" and "spurious" class actions has been criticized by other writers. Typical

of this criticism is the following quotation from Professor Chafee:

> "Finally, inasmuch as there are apparently a good many situations where rights are 'several' and class suits 'spurious', Moore's theory is likely to bring about a considerable number of representative suits in which the judgments will bind only the persons named in the pleadings. It is especially hard to know what good will be accomplished by 'spurious' suits against a class of defendants, for nobody is likely to add himself to be sued and hence only the representatives will be bound. As indicated in the preceding chapter, whenever a class suit is proper at all, the usual principle ought to be that the class is bound by its outcome. The device was invented to avoid naming people, so why limit it frequently to named persons? Class suits are of very little use, if the unnamed members can relitigate the very questions which were decided in the class suit at considerable trouble and expense." (Footnote by the author omitted.) Chafee, Some Problems of Equity 257-58 (1950).

The Restatement of Judgments (§§ 26, 86, 116) draws no line of distinction between the effect of judgments in the various classifications of class actions. Also significant is the tendency of some courts merely to label the representative suit a class action under Rule 23(a) and allow it to obtain the status of a "true" class suit regardless of the theoretical category into which it might fall. This attitude is reflected by the court in *Wilson v. City of Paducah*, 100 F.Supp. 116 (W.D. Ky. 1951) where a class action had formerly been brought by two Negroes against the City of Paducah resulting in a judgment that

> "plaintiffs and other Negro citizens of Paducah, Kentucky, who possessed the qualifications required for admission to Paducah Junior College which are required of white applicants, were entitled to admission to the college . . . ." 100 F.Supp. at 117.

In that action the court entered a judgment granting to the plaintiffs the relief requested. No determination was made by the court fitting the action into any one of the three categories under Rule 23(a). Subsequently, admission was denied to members of the class who were not actual parties to the original action. These members instituted the instant suit asking that the court enforce the prior class decree and petitioning "that the defendants be enjoined from excluding these petitioners from admission to the College as students upon the ground of their membership in the Negro race . . . ." 100 F.Supp. at 117.

The court, relying heavily upon *System Federation No. 91 v. Reed*, 180 F.2d 991 (6th. Cir. 1950) held:

> . . . "[I]ntervention after entry of judgment [is] permissible to members of the class in whose behalf the action was originally filed, even though such intervenors were not specifically named parties in the original action. The intervening petition now being considered is based upon the claim that the intervenors are members of the class for whom the original action was filed. Such a claim entitles them to file the intervening petition." 110 F.Supp. at 118.

The court granted the petition, pointing out that the prior decree in the class action was binding In making no mention of the "true" or "spurious" categories, the court seemingly implies that under Rule 23(a) once plaintiff can prove that he is a member of the class protected under the prior decree, he will be afforded the same treatment as prior plaintiffs, regardless of the type of class action alleged.

Res Judicata Extended

In passing it is interesting to note that the *Reed* case, while not involving race relation issues, illustrates the tendency of some courts to allow all judgments in class action cases to achieve the binding *res judicata* status theoretically afforded only the "true" class action judgment. In the *Reed* case a prior class action had resulted in an injunctive decree barring the defendant L. & N. Railroad from further denial of certain seniority rights to the plaintiff class of the railroad machinists. The petition in the prior action had been couched in terms of "several rights" and "common questions of law and fact" and the defendant in the instant action strongly urged that only a "spurious" decree resulted. Nevertheless, the Court of Appeals affirmed a lower court judgment, holding that the defendants were in contempt of court for denying seniority privileges to a member of

the plaintiff class, even though he had not been present in court at the prior suit. The court stated:

> "One of the allegations of the original complaint in the class suit brought by [the plaintiff in the former class suit] sets forth that 'the rights of said employees and of this plaintiff are several, but said rights are affected by a common question of fact, and common relief is sought for all.' This would indicate a claim based upon a right of a several character; but that was not the substance of the complaint, and it is the substance which controls. A class action was invented for situations in which the number of persons having *substantially* identical interests in the subject matter or litigation is so great that it is impracticable to join them all as parties, in accordance with the usual rules of procedure, and in which an issue is raised which is common to all of such persons. Restatement of the Law, Judgments, Section 86. The substance of the complaint in the prior class action showed that it was brought for a declaratory judgment of the rights of the class employees represented by plaintiffs, to impartial treatment, proper protection of seniority, and to the benefits of such rights based on ability, seniority, and willingness to perform such service without discrimination on account of membership or nonmembership in the union; and for an injunction against violation of such rights. Certainly, under such circumstances, the 'character of the right sought to be enforced for . . . the (plaintiff) class, is . . . joint, or common, within the clear intendment of Rule 23(a) (1)." 180 F. 2d at 996-997.

After a discussion of other cases, the court continued,

> "The suit in which the judgment was entered was certainly, in substance, a true class suit, regardless of an allegation in the complaint that one of the rights sought to be enforced was several in character, upon which, it is to be emphasized, no relief was given. It was not feasible for all the persons whose interest might be affected by the action to be made parties to it. As heretofore mentioned, the class suit was invented for situations in which the number of persons having substantially identical interests in the subject matter or litigation was so great that it was impracticable to join them under the usual rules, and in which an issue was raised which was common to all such persons.
>
> "We see no reason why the judgment in the class action, here under discussion, should not be considered as a judgment in a true class action and *res adjudicata* of the rights of all of the members of the class represented by the parties plaintiff therein.
>
> "In this case, the foundation of Reed's right to intervene is the consent decree and injunction protecting the members of his class from discrimination and enjoining the violation of their seniority rights. It was not a conventional form of intervention; Reed, as a member of the class represented, had a right to intervene to secure the benefits of such decree." 180 F.2d at 997-998.

(4) Character of Rights Asserted

Several cases have questioned whether a right guaranteed by the Fourteenth Amendment can be enforced in a class action, or whether each individual must assert his right in a separate action. In *Holmes v. City of Atlanta*, 124. F.Supp. 290, 1 Race Rel. L. Rep. 146 (N.D. Ga. 1954), plaintiffs, Negro citizens of the city of Atlanta, brought an action "for themselves and other Negroes, similarly situated" seeking a declaratory judgment and injunction against the City of Atlanta, and some of the officials of that city, to secure plaintiffs' admission to the city golf courses.

> "The defendants contend that plaintiffs have no standing to obtain relief for other Negroes who have not been denied the privileges to use the city's golf courses. While it is true that ordinarily one may not sue for the deprivation of the civil rights of another, such rights being 'personal and present,' the facts in this case bring it fairly within the holding in *Beal v. Holcombe*, [193 F.2d 384 (5th Cir. 1951)] where the plaintiffs were permitted to represent others similarly situated." 124 F.Supp. at 293.

The court then ruled that the *School Segregation Cases* applied only to education and not to public recreational facilities but gave judgment on the merits for the plaintiffs on the grounds that

the facilities provided for Negroes were not substantially equal to those provided for white persons. This judgment was affirmed by the Court of Appeals, 223 F.2d 93, 1 Race Rel. L. Rep. 149 (5th Cir. 1955), but modified by the United States Supreme Court in a memorandum decision, 350 U.S. 879, 76 S.Ct. 141, 100 L.Ed. 76, 1 Race Rel. L. Rep. 14 (1955), remanding the case for a decree in conformity with *Mayor & City Council of Baltimore City v. Dawson*, 350 U.S. 877, 76 S.Ct. 133, 100 L.Ed. 75, 1 Race Rel. L. Rep. 15 (1955), The Supreme Court's opinion in the *Dawson* case, a per curiam opinion, affirming 220 F.2d 386, 1 Race Rel. L. Rep. 162 (4th Cir. 1956), had been handed down after the decision of the Court of Appeals in the *Holmes* case.

In the *Holcombe* case, which was quoted with approval in the *Holmes* case, Negro plaintiffs had petitioned for an injunction to restrain the defendant, the City of Houston, Texas, from denying plaintiffs admission to the city's public golf courses. A lower federal court had dismissed the suit stating, "I do not think the failure to provide golf courses in parks used by the Negroes is either as a matter of law or fact a discrimination against Negroes." *Beal v. Holcombe*, 103 F.Supp 218, 219 S.D. Tex. 1950).

The Court of Appeals reversed the lower court 193 F.2d 384 (5th Cir. 1951), holding,

> "The judgment is reversed and the cause is remanded with directions to enter a judgment: declaring that refusing to allow plaintiffs and others similarly situated, because they are negroes, to make use, on a substantially equal basis with white citizens, of municipal facilities for playing golf, is to practice a forbidden discrimination which must be remedied; and enjoining defendants from continuing such practice." 193 F.2d. at 388.

The problem was likewise presented in *Williams v. Kansas City, Mo.*, 104 F.Supp. 848 (W. D. Mo. 1952); *affd.*, 205 F.2d 47 (8th Cir. 1953); *cert. denied*, 346 U.S. 826, 74 S.Ct. 45, 98 L.Ed. 351 (1953), where three Negro residents of Kansas City, Missouri, who had been denied admission to a public swimming pool in Kansas City, brought a class action for a declaratory judgment and injunction. The District Court allowed the plaintiffs to sue on their own behalf but dismissed the action as a class action, stating:

> "Plaintiffs seek to maintain this action not only in their own right, but as a class action under Rule 23, Federal Rules of Civil Procedure, 28 U.S.C.A., for and on behalf of all other Negro citizens similarly situated who reside in Kansas City, Missouri. Without laboring that point, we rule that plaintiffs may maintain the instant action in their own behalf, but same cannot be presented as a pure class action. It is an elementary principle in constitutional law that it is the individual who is entitled to the equal protection of the law, and if he is denied a facility or convenience which, under substantially the same circumstances, is furnished to another citizen, the individual alone may complain that his constitutional privilege has been invaded, and he has no standing to sue for the deprivation of similar civil rights of others. This is so whether the other persons who may be injured are persons of the same race or occupation." 104 F. Supp. at 857.

Subsequently the Court of Appeals expressly disapproved this language while sustaining the lower court's ruling on other grounds. The Court of Appeals stated:

> "It is of course necessary generally that a plaintiff be able to show injury to himself in order to entitle him to seek judicial relief. He cannot be a mere volunteer and ask judicial intervention simply 'because someone else may be hurt,' but he 'must present facts sufficient to show that his individual need requires the remedy for which he asks.' . . . But where he is able to establish his right to individual relief on this basis, he may also under certain conditions ask that the benefit of that adjudication be extended to others, where they constitute a class standing generally in the same legal situation, where they are so numerous as to make it impracticable to bring them all before the court, and where the granting of such relief seems likely to serve some useful legal purpose—for example, preventing a multiplicity of suits.
>
> "Violations of the Fourteenth Amendment are of course violations of individual or personal rights, but where they are committed on a class basis or as a group policy, such as a discrimination generally because of

race, they are no less entitled to be made the subject of class actions and class adjudications under Rule 23, Federal Rules of Civil Procedure, 28 U.S.C.A., than are other several rights. And the District Courts, where the question has so arisen, have practically unanimously so recognized." 205 F.2d at 51-52.

(5) Adequate Representation of Members of the Class:

Rule 23 (a) requires at the outset that parties representing the other members of the class must in fact be members of the class sought to be represented and must "fairly insure the adequate representation of all." More class action litigation turns on these points than on any other. Adequate representation of the class is doubly important. The courts refuse to entertain the action as a class action under Rule 23 (a) if the class is not adequately and properly represented. Furthermore if the litigating parties to the class action pursue an alleged class suit to a successful judgment only to have it determined in later litigation that they did not adequately represent the other members of the class, then the prior class suit is not *res judicata* as to anyone except the original parties.

Adequate representation, like impracticability of joinder, depends upon the facts and circumstances present in each individual case, and no rigid rules may be formulated. In illustrating this point the following non-race relation case is typical.

Employee as Representative

In *Pelelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173 (S.D. Ill. 1939); aff'd, 113 F.2d 629 (7th Cir. 1940), the court was faced with the necessity of deciding if an employee, whose employment had been terminated three years prior to the date the suit in question was instigated, could adequately represent the other employees of the company in a suit against his former employer for an accounting of certain group insurance dividends. The other employees had not requested the plaintiff to sue in their behalf. The court in denying class relief, stated:

> "... [I]t is the court's opinion that the plaintiff has not shown himself to be such a person 'as will fairly insure the adequate representation of all' in whose behalf he assumes to sue. He has not been a fellow employee of the class whom he seeks to represent for approximately three years. He has not been insured under the group policy in question, as are practically all of the members of the class for whom he seeks to sue, for a period of approximately three years." 30 F.Supp. at 175-76.

On appeal the Court of Appeals affirmed the trial court stating:

> "Moreover, we think the District Court was fully justified in finding that plaintiff did not fairly insure the adequate representation of those he proposed to represent as required by Rule 23(a) of the Rules of Civil Procedure. It is a condition precedent to the existence of the right to maintain a class action that the court find that the plaintiff's suit will fairly insure the adequate representation of all. This raises a question of fact for the trial court upon which it passes judicially." 113 F.2d at 632.

Of the factors which must be considered by the court seeking to ascertain if the class, sought to be represented is adequately represented, the following are important:

(a) *The type of class action involved—"True," "Hybrid," or "Spurious":*

As has already been pointed out *supra*, under those authorities led by Professor Moore the "hybrid" and "spurious" class action judgments under Rule 23(a) are not binding on members of the so-called class, and thus there is no necessity that the members of the class be adequately represented. Illustrative of this point is the language of the court in *Oppenheimer v. F. J. Young & Co.*, 144 F.2d 387 (2nd Cir. 1944), a case which did not involve race relations. The court stated:

> "We see no reason for going farther than to hold that on the face of the complaint the plaintiffs have brought themselves within the provisions of Rule 23(a) (3). Inasmuch as persons who do not become parties cannot be affected by the decision, we need not go farther as to the adequacy of plaintiff's representation of others in the class. A stricter rule as to the adequacy of repre-

sentation ought to obtain where the judgment is held binding on members of a class who do not intervene." 144 F.2d at 390.

In the "true" class action situation and in those situations where the court grants a class action decree under Rule 23(a) without classifying the particular subsection into which the action fell, the problem of adequate representation is, by all authority, of primary importance as the other members of the class will not be bound by the class decree unless the class is adequately represented. A ready example is the leading case of *Hansberry v. Lee*, 311 U.S. 32, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Plaintiffs, white property owners in the City of Chicago, sued defendant Negroes to enforce a restrictive covenant which specified that the land could not be "sold, leased to or permitted to be occupied by any person of the colored race." The covenant also provided that the restriction was to be ineffective unless ninety-five percent of the property owners within the area had signed it. In an earlier suit, in which none of the present litigants were parties, an action had been brought to enforce the same restrictive covenant. In this suit, it had been stipulated that the required number of owners had signed the agreement. *Burke v. Kleiman*, 277 Ill. App. 519 (Ill. 1934). The Supreme Court of Illinois held that the defendants in the second suit were members of the class represented by the plaintiffs in the first suit and that they were therefore bound by that stipulation. Judgment was rendered for the plaintiffs. 372 Ill. 369, 24 N.E.2d 37 (1939).

The Supreme Court of the United States reversed this judgment pointing out that such a judgment denied defendants the due process of law guaranteed by the Fourteenth Amendment. The Court stated:

> "State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under state constitutions and laws, subject only to the requirements of the Constitution of the United States. But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." 311 U.S. at 40.

The Court, also commented:

> "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties [citing cases] or where the interest of the members of the class, some of whom are present as parties, is joint, or where for any other reason the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." 311 U.S. at 42-43.

The court ruled that the defendants had not been so represented in the first action as to satisfy the requirements of due process of law.

For a listing of the decisions that have made "searching inquiry as to adequacy of representation" in suits that Professor Moore would label as "spurious" but where the courts made no effort to classify the action under any of the subdivisions of Rule 23(a), see 3 Moore, Federal Practice, 3426 (1948); none of these cases involve race relations.

(b.) *The interest of the representatives of the class must be co-extensive with the interests of the other members of the class—the representatives must be in fact members of the class:*

In the *Pelelas* case, discussed *supra*, the court stated, "The rule carried into the present code the essence of former Equity Rule 38, 28 U.S.C.A. following section 723. It is even more stringent; and under it the court is at liberty to consider . . . whether the relationship between the parties to the record is unique or one identical and common with that of all others of a class." 113 F.2d at 632.

The general rule may be fairly stated to be that the interest of the representative of the

members of the class, plaintiff or defendant, must be co-extensive with all the members of the class he seeks to represent. In *Weeks v. Bareco Oil Co.*, 125 F.2d 84 (7th Cir. 1941), a non-race relations case, plaintiffs, two jobbers of gasoline, instigated a suit on their own behalf and as representatives of a class of some nine hundred other jobbers to recover treble damages from the defendant oil company, alleging that the defendant had caused the injuries for which redress was sought by a conspiracy to fix prices in violation of the anti-trust laws. The decision of the District court dismissing the entire suit was reversed, but the appellate court affirmed the dismissal of the suit as a class suit. The court stated:

> "There is no question but that the amount recoverable by each possible claimant is different, both as to basic figure of percentage of profit denied them, and also as to amount of gasoline sold. This factor is not decisive of the propriety of a class suit. It does, however, bear on the advisability of such a suit—on the wisdom of the exercise of the District Court's discretion. . . .
>
> "The class suit, although binding on all members for whom the suitors may speak, is not binding upon those whose interests are at variance with the position taken by the true members of the class." (citing *Hansberry v. Lee, supra*). 125 F.2d at 91.

An interesting aspect of the adequate representation problem was also presented in *McDaniel v. Board of Public Instruction for Escambia County, Fla.* 39 F.Supp. 638 (N.D. Fla. 1941) where the court was directly faced with the problem of making a determination as to whether the plaintiff was in fact a member of the class he sought to represent and whether his interests were co-extensive. The plaintiff, who sued under the usual allegation "on behalf of himself and others similarly situated," was a Negro principal of a public school. He sought to obtain a declaratory judgment that the policy of paying Negro teachers less than was paid to white teachers was a denial of equal protection of the laws guaranteed by the Fourteenth Amendment and should thus be enjoined. The defendants contended

> "that plaintiff McDaniel does not represent a class because of the fact that he is a principal of a high school and not a teacher therein. This contention must fail as the principals of the high schools and teachers therein and teachers in the elementary schools are all members of the same profession and are required to be possessed of certain qualifications prescribed by the Board." 39 F.Supp. at 641.

(c.) *The representatives of the class must have no interest that is antagonistic to the interests of other members of the class:*

As was seen in the *Weeks* case, *supra*, it is necessary that a party who is to represent a class adequately must have interests that are wholly compatible with the interests of the class. While the more striking example of an antagonistic interest which defeats adequate representation is to be found in cases where one creditor seeks to gain a preference over other creditors whom he allegedly represents in a class action, [see, 3 Moore, Federal Practice, 3428 (1948)], nevertheless the presence of an "antagonistic interest" may play an important role in cases involving race relations. In *Hansberry v. Lee, supra*, the Court made this important comment:

> "It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. [Citing cases.] It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for the purpose of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." 311 U.S. at 44-45.

(d.) *There must be adequate numerical representation:*

Rule 23(a) sets up no definite percentage of the members of the class who must appear in court in order that the class may be properly

represented. However, the appellate court in the *Pelelas* case, *supra*, made this observation:

> "[Rule 23] is even more stringent; and under it the court is at liberty to consider the number appearing on record as contrasted with the number in the class; . . .There must be a sufficient number of persons to insure a fair representation of the class.
>
> "We are unable to say, after considering all the elements involved, that the District Court erred in its ultimate finding and conclusion that plaintiff had not complied with Rule 23(a). Being a discretionary order, founded upon the facts, the court will not interfere therewith, in the absence of improvident action." 113 F.2d at 632-33.

Also in the *Weeks* case *supra* the court stated:

> "In the instant case we have two plaintiffs suing for and on behalf of nine hundred. This, on its face, seems small, but nevertheless a suit may be welcomed and supported, in fact, by a large percentage of said nine hundred, although many would not care to start separate, individual suits. Others, because of fear of costs and any other good reason, may not favor the class suit. May it be said that the two, therefore, did insure an adequate representation of the others?
>
> "An examination of the decisions leads to the conclusion that some courts have recognized that great disparity between the numbers actually suing and the number in the class, is of some importance." 125 F.2d at 91.

The court proceeded to examine a number of cases, then continued,

> "Our conclusion is that dismissal would not be justified on the ground that plaintiffs are too few in number compared to the total number in the class.
>
> "More concerned are we with the showing that plaintiffs do not fairly insure the adequate representation of all persons who constitute the class for whom this suit is brought." 125 F.2d at 93.

On this point and the question of adequate representation of the class in general the following two cases are of interest.

In *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, 140 F.2d 35 (4th Cir. 1944), the plaintiff, a Negro fireman employed by the Norfolk Southern Railway, sued, on behalf of himself and other Negro firemen employed by the same railroad, the railway, the Brotherhood, together with certain subordinate lodges of that brotherhood and one of the officers of a local lodge. He alleged that the defendants had discriminated against him because of his race with respect to certain seniority rights. The case has an extended procedural history. The district court in an unreported decision gave judgment for the defendants which was affirmed by the Court of Appeals. This decision was reversed by the United States Supreme Court in 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944). Upon remand to the Court of Appeals, 148 F.2d 403 (4th Cir. 1945), the defendants sought dismissal of the action "on grounds that process had not been served on the brotherhood and one of its subordinate lodges." The defendant further argued that since the service was improper, the proper representative of his class was not before the court, and therefore any action taken by the court was void as to the defendant. The court rejected this contention, saying that the action was against defendants as a class, as well as being brought by the plaintiffs as a class. Thus, said the court, since one of the subordinate lodges was adequately served and since it had appeared in court and defended, the defendant class was adequately represented. The court stated:

> "It cannot be contended with any show of reason that Munden [officer of the subordinate lodge] and the subordinate lodge, who were admittedly served, were not fairly representative of the membership of the brotherhood. . . ." 148 F.2d at 406.

The case was remanded to the district court, which gave judgment for the plaintiff. 69 F. Supp. 826 (E.D.Va. 1946); *aff'd*, 163 F. 2d 289 (4th Cir. 1947); *cert. denied*, 332 U.S. 841, 68 S.Ct. 262, 92 L.Ed. 413 (1947).

Brotherhood of Locomotive Firemen and Enginemen v. Graham. 175 F.2d 802 (D.C.Cir. 1948); *reversed*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949) presented a similar fact situation. Twenty-one Negro firemen, employees of the defendant carriers, sought an injunction and damages, alleging that no Negroes were

allowed to join the Brotherhood and that plaintiffs, because of their race, were being deprived of seniority rights. The lower court granted temporary injunction. The Court of Appeals ruled that the venue was improper, ordering the action transfered to a Federal District Court in Ohio. This was reversed and remanded by the Supreme Court. In a dictum, the Court of Appeals, considering whether the action could be sustained on the basis that the defendants constituted a class, ruled that the action could not be so sustained, saying that the persons served with process were not adequately representative of the alleged class. The court stated:

> "... [A]lthough it is alleged in the complaint that the two local lodges and McQuade and Lacey [Union officers] are truly representative of the Brotherhood and that they are sued as representatives, there is no finding to that effect, and on the record there is no basis for such a finding."

The court then added:

> "It therefore does not appear in the instant case that the two local lodges and McQuade and Lacey had an interest in the outcome of the suit which was co-extensive with that of the Brotherhood. This is an essential element of the true class suit under Rule 23(a).... The requirement of Rule 23(a) that the class representatives sued must be such 'as will fairly insure the adequate representation of all' is but a reflection of the requirements of due process." 175 F.2d at 807.

However, the issue of adequate representation was not discussed by the Supreme Court, the reversal being placed on other grounds.

V. CONCLUSION

One writer has recently said that there "are at least three advantages of the class-action suit for litigants claiming wrongful school segregation." McKay, *"With all Deliberate Speed" A Study of School Desegregation,* 31 N.Y.U.L. Rev. 991, 1085 (1956). One of the advantages suggested is the elimination of the danger, present when there is a single plaintiff, that the question may become moot because he graduates or moves from the school district. Another is the avoidance, through the intervention of other plaintiffs similarly situated, of the danger of dismissal or compromise. The additional advantage is said to be that a favorable decree will apply at least to all members of the class who join in the suit and will possibly support enforcement proceedings by other members of the class, especially where the court has granted injunctive relief in favor of the plaintiffs in the proceedings and all others similarly situated. As shown above, however, some uncertainty exists as to whether representative suits involving race relations are "true" class actions. Several race relations cases, including a school suit (*Wilson v. Beebe, supra*), have been described by the courts as "spurious" class actions. The difference of opinion concerning whether members of a so-called "spurious" class get the benefit of *res judicata* without becoming parties to the class action makes it a matter of some doubt as to whether a decree against discrimination will support enforcement proceedings by members of the class who do not join in the class suit leading to the decree. A similar area of doubt seems to exist even where the decree is in favor of all others similarly situated. Further litigation will be required to resolve these uncertainties.

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